United States Court of Appeals

for the Second Circuit

APPENDIX

No. 74-1406

74-1406

Signed

B

P/S

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATHAN and JOANNE T. CUMMINGS,

Appellees

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellant

ON APPEAL FROM THE DECISION OF THE

UNITED STATES TAX COURT

APPENDIX

SCOTT P. CRAMPTON,
Assistant Attorney General,

MEYER ROTHWACKS,

LOUIS A. BRADBURY,
Attorneys,
Tax Division,
Department of Justice,
Washington, D.C. 20530.

PAGINATION AS IN ORIGINAL COPY

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UNITED STATES TAX COURT
GENERAL DOCKET

DOCKET NO. 2653-71

NATHAN CUMMINGS and
JOANNE T. CUMMINGS

375 Park Avenue

New York, New York 10022 PETITIONER.

VS.

COMMISSIONER OF INTERNAL REVENUE.

RESPONDENT.

APPEARANCES FOR PETITIONER:

NAME: Anderson A. Owen; Edward W. Rothe, (Hopkins, Sutter, Owen, Mulroy & Davis), One First National Plaza, 52nd Floor, Chicago, Illinois 60670

ADDRESS: Mortimer M. Caplin; Ralph A. Muoio, 1101 Seventeenth Street, N.W., Washington, D.C. 20036

*Glen H. Kanwit, (6/1/72)*Same firm

Date Month Day Year	Filings and Proceedings	Action	Served
Apr.21,1971	PETITION FILED: FEE PAID Apr.21,1971		Apr.29,1971
Apr.21,1971	REQUEST by Petr. for trial at Chicago, Ill. filed	GRANTED Apr.29,1971	Apr.29,1971
June 8,1971	ANSWER filed by Resp		June 9,1971
Feb. 7, 1972	NOTICE OF TRIAL on May 8, 1972 at Chicago, Ill.		Feb. 7, 1972
May 16, 1972	TRIAL at Chicago, Ill. before Judge Simpson		
	(Glen H. Kanwit (special permission to appear— granted) Stipulation of facts with exhibits, Motion for leave		
	to file appearance, - GRANTED May 16, 1972		Jun. 2, 1972
	Entry of appearance (Kanwit - withheld application pending)		
	PETITIONERS BRIEF due July 17, 1972		
	REPLY BRIEF for Respondent due Aug. 31, 1972		
	REPLY BRIEF for Petitioners due Oct. 2, 1972		
	SUBMITTED TO JUDGE SIMPSON		
June 12, 1972	TRANSCRIPT of May 16, 1972 rec'd.		
June 1,1972	ENTRY OF APPEARANCE by Glen H. Kanwit as counsel for		
	the petr. filed		Jun. 30, 1971
July 14, 1972	BRIEF for Petitioners filed		July 19, 1972
Aug. 31, 1972	BRIEF IN ANSWER for Respondent filed.		Sept. 1, 1972
Oct. 2, 1972	REPLY BRIEF for Petitioners filed.		Oct. 4, 1972
April 23, 1973	FINDINGS OF FACT and OPINION filed, Judge Simpson.		April 23, 1973
	Decision will be entered for the petitioners.		

DOCKET NO. 2653-71

(Continuation)

NATHAN CUMMINGS AND JOANNE T. CUMMINGS		PETITIONER	PAGE 2
Date Month Day Year	Filings and Proceedings (JUDGE SIMPSON)	Action	Served
April 23, 1973	DECISION ENTERED, Judge Simpson.		April 23, 1973
July 5, 1973	MOTION by Resp for special leave to file motion to vacate Decision. (motion to vacate Decision Lodged)	GRANTED July 9,1973	July 9, 1973
July 5, 1973	MOTION by Resp. for special leave to file motion for reconsideration and revision of Opinion. (Motion for reconsideration and revision of Opinion Lodged)	GRANTED July 9, 1973	July 9, 1973
July 9, 1973	MOTION BY RESP. TO VACATE DECISION FILED.		
July 9, 1973	MOTION BY RESP. for Reconsideration and Revision of Opinion, filed.		
July 9,1973	ORDER, that resp's motion to vacate the decision in case is hereby granted, and decision is vacated and set aside.		JUL 9 1973
July 9, 1973	ORDER, that a copy of resp's motion shall be served on petitioners' and each party shall submit a brief in support of his position on or before Aug. 15, 1973.		JUL 9 1973
Aug. 13, 1973	BRIEF by Petrs. in opposition to Resp. motion for reconsideration and revision of Opinion filed.		
Aug 15, 1973	MEMORANDUM BRIEF for Respondent in support of Respondent's motion for reconsideration and revision of opinion.		AUG 16 1973
Oct. 2, 1973	OPINION filed, Judge Simpson. Decision will be entered for the petitioners.		Oct. 2, 1973
Oct. 2, 1973	DECISION ENTERED. Judge Simpson.		Oct. 2, 1973
	APPELLATE PROCEEDINGS		
Dec. 28, 1973	NOTICE of Appeal to U.S.C.A. 2nd Circuit filed by Resp		Dec. 28, 1973
Dec. 28, 1973	NOTICE of Filing with copy of notice of appeal mailed to Mr. Owen.		Dec. 28, 1973
	Continued to Page 3		

GPO 892-076

TAX COURT OF THE UNITED STATES

GENERAL DOCKET

DOCKET NO. 2653-71

(Continuation)

NATHAN CUMMINGS AND JOANNE T. CUMMINGS — PETITIONER — PAGE 3

Date Month Day Year	Filings and Proceedings	Action	Served
Dec. 28, 1973	NOTICE, to parties, of assembling and date for trans-		
	mission of the record.		Dec. 28, 1973
Jan. 17, 1974	MOTION by respondent to extend the time for transmission		
	of the record to March 28, 1974.	GRANTED Jan.18,1974	Jan. 18, 1974
Jan. 18, 1974	NOTICE, to parties, of assembling and extension of the		
	date for transmission of the record.		Jan. 18, 1974

GPO 1973 O - 493-375

UNITED STATES TAX COURT

NATHAN CUMMINGS and JOANNE T. CUMMINGS,	)	
Petitioners,	)	Docket No. 2653-71
v.	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent.	)	

STIPULATION OF FACTS

It is hereby stipulated that for the purposes of this case the following statements may be accepted as facts and all exhibits referred to herein and attached hereto are incorporated in this stipulation and made a part thereof; provided, however, that either party has the right to object to the admission of any such facts and exhibits in evidence on the grounds of materiality and relevancy, and provided further, that either party may introduce other and further evidence not inconsistent with the facts stipulated.

1. Petitioners, Nathan Cummings and Joanne Cummings, husband and wife, filed their 1968 joint Federal income tax return with the District Director, Internal Revenue Service, at Chicago, Illinois. At the time the petition in this case

was filed, they resided at 375 Park Avenue, New York, New York.

2. During 1962, and since 1940, the principal occupation of Mr. Cummings has been that of chairman of the board and chief executive officer of Consolidated Foods Corporation. Consolidated Foods Corporation was founded in 1930 by Mr. Cummings and, in 1962, was a leading processor, canner, wholesale and retail distributor of food products with annual sales in excess of $500 million.

3. In 1962 Mr. Cummings was also a director of the following companies:

Associated Products, Inc.

Rothschild Enterprises, Inc.

College Inn Food Products Co.

Nemzeh Fine Foods, Ltd.

Metro-Goldwyn-Mayer, Inc.

Rival Packing Corp.

4. In addition to the directorships held by Mr. Cummings in 1962, Mr. Cummings had previously been a director of the Bon Ami Corporation, City Stores Company, and Kay Woodie Company. Since 1962, Mr. Cummings has been a director of

Society Corporation (the holding company for Society National Bank of Cleveland, Ohio), Western Union Telegraph Co., and General Dynamics Corporation.

5. In 1959 Mr. Cummings acquired 51,500 shares of common stock of Metro-Goldwyn-Mayer, Inc. ("MGM") and was elected a director of MGM.

6. On April 17, 1961 Mr. Cummings sold 3,400 shares of MGM stock for a total of $227,648.28. The gain realized by Mr. Cummings as a result of this sale was reported as a long-term capital gain on petitioners' 1961 Federal income tax return, along with the gains from other sales of MGM stock in March, 1961.

7. On various dates from September 18 through October 2, 1961 Mr. Cummings purchased a total of 5,000 shares of MGM stock for a total of $166,960.63. None of these shares was sold prior to December 31, 1962.

8. Mr. Cummings was a director of MGM both at the time of the sale of the 3,400 shares on April 17, 1961 and at the time of purchase of the 5,000 shares in September - October, 1961.

9. On January 14, 1963, the Division of Corporation

Finance of the Securities and Exchange Commission sent a letter to the secretary of MGM, a copy of which is attached as Petitioners' Exhibit 1.

10. Upon receipt of the letter from the SEC, the secretary of MGM immediately informed Mr. Cummings of the SEC letter. On January 17, 1962, Mr. Cummings paid to MGM $53,870.81, with a covering letter to the secretary of MGM, a copy of which is attached as Petitioners' Exhibit 2. This amount represented the difference between the September-October 1961 aggregate purchase price of $146,960.89 for 3,900 shares of MGM stock and the April 17, 1961 sale price of a like number of shares (3,600 out of the 3,400 shares actually sold on that date), which was $200,831.70.

11. Attached hereto as Petitioners' Exhibit 3 is a copy of the MGM Notice of Annual Meeting and Proxy Statement of January 18, 1962.

12. On February 1, 1962, E. J. Steinmetz submitted a report to Mr. Cummings, a copy of which is attached as Petitioners' Exhibit 4. On February 6, 1962, Mr. Cummings wrote a letter to the Secretary of MGM, a copy of which is attached as Petitioners' Exhibit 5.

13. On February 9, 1962, the Secretary of MGM wrote a letter to Mr. Cummings, a copy of which is attached as Petitioners' Exhibit 6. On February 13, 1962, Mr. Cummings replied to the Secretary of MGM; a copy of his letter is attached as Petitioners' Exhibit 7. On February 20, 1962, the Secretary of MGM wrote a letter to Mr. Cummings, a copy of which (with enclosure) is attached as Petitioners' Exhibit 8.

14. No refund was ever made to Mr. Cummings by MGM of the $53,070.81 paid by Mr. Cummings to MGM.

15. The payment made by Mr. Cummings to MGM of $53,070.81 was deducted by Mr. Cummings as an ordinary loss for "Metro-Goldwyn-Mayer, Inc. - Insidens Profit" on petitioners, 1962 Federal income tax return.

16. The $43,794.10 deficiency determined by the Commissioner (plus [illegible] in this case is attributable to the disallowance of the $53,070.81 payment as a business expense, and to treatment by the Commissioner of the payment

as a long-term capital loss.

Counsel for Petitioners

Lee H. Henkel, Jr.

Acting Chief Counsel,
Internal Revenue Service.

January 16, 1962

Mr. Joseph A. Macchia, Secretary
Metro-Goldwyn-Mayer Inc.
1540 Broadway
New York 36, New York

Re: File No. 1-2500

Dear Sir:

We have the following comments on the preliminary proxy soliciting material of Metro-Goldwyn-Mayer Inc. received January 9, 1962, for the annual stockholders' meeting to be held February 23, 1962:

It is noted from his ownership reports on file with the Commission that Mr. Nathan Cummings purchased 3,000 shares of the Company's common stock during September and October, 1961, after having sold a like amount within six months prior to such purchase. If he has realized any material profits from these transactions which under Section 16(b) of the Securities Exchange Act of 1934 inure to and are recoverable by the issuer, the pertinent facts with respect to these transactions should be disclosed in the proxy statement pursuant to Item 7e.

If the Company will reimburse Georgeson and Kissel for certain expenses which are not included in the fee, the estimated amount thereof should be set forth in the last paragraph of the proxy statement.

Pursuant to Rule 14a-4(e) the proxy statement or form of proxy should clearly provide that where the person specifies by means of a ballot provided a choice with respect to the matters to be acted upon, the shares will be voted in accordance with the specifications so made.

Very truly yours,

/s/

Harvey A. Thorson
Assistant Director
Division of Corporation Finance

By _____
Martin A. Behrens, Branch Chief

Petitioners' Exhibit 1
Dkt. No. 2653-71

January 17, 1962

Dr. Joseph A. Macchia, Secretary
Metro-Goldwyn-Mayer, Inc.
1540 Broadway
New York 36, New York

Dear Mr. Macchia:

Pursuant to my telephone conversation with you, I am enclosing herewith a check of Nathan Cummings in the amount of $53,870.81. He will discuss this with you on the telephone Thursday.

Sincerely,

/s/

E. S. Steinmetz
rd
Enclosure
cc: Nathan Cummings

Petitioners' Exhibit 2
Dkt. No. 2653-71

METRO-GOLDWYN-MAYER INC.
1540 BROADWAY, NEW YORK 36, N. Y.

NOTICE OF ANNUAL MEETING

To be held on

February 23, 1962

To the Stockholders:

The Annual Meeting of Metro-Goldwyn-Mayer Inc., a Delaware corporation, will be held at the Hotel Astor, Broadway and 45th Street, New York, N. Y., on Friday, February 23, 1962 at 11:00 o'clock in the forenoon for the following purposes:

1. To elect a Board of Directors.
2. To consider and act upon the ratification of the selection of independent auditors.
3. To consider and act upon a proposal of two stockholders regarding cumulative voting.
4. To transact such other business as may properly come before the meeting or any adjournments thereof.

Stockholders of record at the close of business on January 18, 1962 are entitled to notice of and to vote at the meeting.

By order of the Board of Directors,

JOSEPH A. MACCHIA,
Secretary.

PLEASE DATE, SIGN AND MAIL THE ENCLOSED PROXY.
Use the enclosed envelope which requires no postage for mailing in the United States.

January 18, 1962.

Petitioners' Exhibit 3

METRO-GOLDWYN-MAYER INC.

PROXY STATEMENT

The form of proxy accompanying this statement and the person named therein as proxies have been approved by the Board of Directors of Metro-Goldwyn-Mayer Inc. (hereinafter called "M-G-M") and this solicitation is made on behalf of the Management of M-G-M. Any proxy delivered pursuant to this solicitation is revocable at any time prior to the exercise thereof, and the person executing the same, if in attendance at the meeting, may vote in person instead of by proxy. When proxies in this form are returned properly executed the shares represented thereby will be voted, and where a choice has been specified by the stockholder by means of the ballot provided on the proxy they will be voted in accordance with the specifications so made.

Matters to be considered and acted upon at the meeting are set forth in the Notice of Meeting accompanying this proxy statement and are more fully outlined herein.

The authorized capital stock of M-G-M consists of 3,000,000 shares of common stock without nominal or par value of which 2,548,229 shares were outstanding at the close of business on January 18, 1962 and are entitled to be voted at this meeting. Each such share is entitled to one vote on all matters which may come before the meeting.

The Annual Report for the fiscal year ended August 31, 1961 has been separately mailed to all stockholders of record January 18, 1962.

I. ELECTION OF DIRECTORS

One of the purposes of the meeting is to elect 15 Directors to serve until the next annual meeting or until their respective successors shall have been elected.

The shares represented by the proxies solicited hereunder will be voted and it is the intention of the proxies named therein to vote such shares in favor of the 15 nominees named below, all of whom are now Directors of M-G-M. In the event any of the said nominees should be unavailable (which contingency is at present not anticipated) it is the intention of the persons named in the proxies to select and cast their vote for the election of such other person or persons as the Management may designate.

The following table sets forth for each of the above nominees, as reported by him: (1) principal occupation or employment; (2) year in which he first became a director of M-G-M and (3) the securities of M-G-M beneficially owned, directly or indirectly, at the close of business on December 1, 1961.

Name	Principal Occupation or Employment	First Became a Director	Shares of Common Stock of the Corporation Beneficially Owned
ELLSWORTH C. ALVORD	Lawyer; partner, Alvord & Alvord	1957	1,760[a]
GEN. OMAR N. BRADLEY	Chairman of the Board, Bulova Watch Co.; manufacture and sale of watches	1957	50
BENNETT CERF	President, Random House, Inc., book publishers	1957	800
NATHAN CUMMINGS	Chairman of the Board, Consolidated Foods Corporation; processor, distributor and retailer of food products	1959	43,981
IRA GUILDEN	President, General Industrial Enterprises, Inc. and Baldwin Securities Corporation; registered investment companies[1]	1958	950[b]
GEORGE L. KILLION	President, American President Lines, Ltd.; steamship business[2]	1957	11,000

Name	Principal Occupation or Employment	First Became a Director	Shares of Common Stock of the Corporation Beneficially Owned
J. Howard McGrath	Lawyer	1957	500
Benjamin Melniker	Vice President and General Counsel	1954	1,185
Robert H. O'Brien	Executive Vice President and Treasurer[b]	1957	1,185
William A. Parker	Chairman of the Board, Incorporated Investors, Inc., The Parker Corporation and Incorporated Income Fund[b]	1935	1,000[c]
Philip A. Roth	Executive Vice President and Treasurer, General Industrial Enterprises, Inc. and Vice President and Treasurer, Baldwin Securities Corporation; registered investment companies[b]	1958	100[b]
Charles H. Silver	Executive Assistant to the Mayor of City of New York for Education and Industrial Development	1957	700[d]
John I Snyder, Jr.	Chairman of the Board and President, U. S. Industries, Inc.; manufacturer of diversified steel products[b]	1958	50
John L. Sullivan	Lawyer; partner, Sullivan & Wynot, and Sullivan, Shea & Kenny	1955	2,050
Joseph R. Vogel	President[b]	1939[e]	12,578

(a) In addition, 40 shares are owned by Mr. Alvord of record but not beneficially.

(b) General Industrial Enterprises, Inc. and Baldwin Securities Corporation own beneficially 22,400 and 22,700 shares, respectively.

(c) Incorporated Investors, Inc., owns 20,000 shares, and Incorporated Income Fund owns 14,500 shares. In addition, 3,000 shares are owned by Mr. Parker's wife.

(d) Mr. Silver is Executor of an estate which owns 500 shares.

(e) Mr. Vogel was not a Director of M-G-M from August 31, 1954 until October 18, 1956, while he was President and a Director of the former theatre subsidiaries of M-G-M.

(f) Chairman of M-G-M Executive Committee.

(g) Chairman of M-G-M Board of Directors and Ex-officio member of M-G-M Executive Committee.

(h) Member of M-G-M Executive Committee.

Mr. Ellsworth C. Alvord is a partner in the firm of Alvord & Alvord, which firm has acted for M-G-M and its subsidiaries from time to time in certain tax matters. It is contemplated that this relationship will continue. During the fiscal year ended August 31, 1961, his law firm was paid $40,735 by M-G-M in fees for services rendered.

Remuneration and Other Information

The aggregate remuneration (including fixed allowances for expenses) received from M-G-M and its subsidiaries for the fiscal year ended August 31, 1961 or for a portion of such fiscal year during which the persons named below were directors or officers, for services in all capacities for: (1) each person who was a director during such fiscal year and whose remuneration exceeded $30,000; (2) each person who was one of the three highest paid officers of M-G-M and (3) all persons as a group who, at any time during such fiscal year were directors or officers of M-G-M, is set forth in the following table.

Name of Individual or Identity of Group[a]	Aggregate Remuneration	Annual Benefits Estimated To Be Payable Under Retirement Plan From Normal Retirement Date[b]
JOSEPH R. VOGEL, President	$156,000[c]	$40,000
ROBERT H. O'BRIEN, Executive Vice President and Treasurer	78,000[d]	18,060
SOL C. SIEGEL, Vice President in Charge of Production	156,000[e]	34,491
BENJAMIN MELNIKER, Vice President and General Counsel	65,000[f]	26,053
BENJAMIN THAU, Vice President and Studio Executive	156,000[g]	40,000
All directors and officers as a group (24), including the above[h]	1,095,010	

(a) After the 1960 fiscal year and up to January 18, 1962, options granted in 1959 covering 39,100 shares (including 12,000 shares for Joseph R. Vogel, 3,000 shares for Robert H. O'Brien, 6,000 shares for Sol C. Siegel, 1,000 shares for Benjamin Melniker and 6,000 shares for Benjamin Thau) were exercised for $30.25 per share. The market value of the company's Common Stock at times of exercise of these options ranged from $42⅝ - $49½ per share.

(b) The estimated benefits shown above are those which will be provided by Company contributions assuming continued employment at the same rate of compensation until normal retirement (age 65) and no changes in the plan. In no event shall benefits payable exceed $50,000 per annum to any employee on account of Company contributions. The plan also provides for voluntary contributions on the part of employees. The plan can be modified or discontinued by the Company at any time.

(c) Under the terms of his employment agreements Mr. Vogel is entitled to receive, after termination of his employment $1,000 per week for the number of weeks of employment since October 22, 1956. The agreements provide, among other things, that he render advisory services as therein set forth. During the fiscal year ended August 31, 1961, the Company, accrued $52,000 for the above.

(d) Under the terms of his employment agreement Mr. O'Brien is entitled to receive, after termination of his employment $500 per week for the number of weeks of employment since May 28, 1959. The agreement provides, among other things, that he render advisory services as therein set forth. During the fiscal year ended August 31, 1961, the Company accrued $26,000 for the above.

(e) Under the terms of his employment agreement, as amended on January 4, 1962, Mr. Siegel will be entitled to receive in a lump sum on January 15, 1963, an amount equal to $1,500 per week for the number of weeks of employment since April 10, 1961 to June 15, 1962 (the date of expiration of said agreement as amended) unless sooner terminated as therein provided. During the fiscal year ending August 31, 1961, the Company accrued $30,000 with respect to said obligation.

(f) Under the terms of his employment agreement Mr. Melniker is entitled to receive, after termination of his employment, $250 per week for the number of weeks of employment since May 28, 1959. The agreement provides, among other things, that he render advisory services as therein set forth. During the fiscal year ended August 31, 1961, the Company accrued $13,000 for the above.

(g) Under the terms of his employment agreements Mr. Thau is entitled to receive, after termination of his employment, $1,000 per week for the number of weeks of employment since March 1, 1958. The agreements provide, among other things, that he render advisory services as therein set forth. During the fiscal year ended August 31, 1961, the Company accrued $52,000 for the above.

(h) Includes remuneration for portion of year in which persons were directors or officers. The total amount accrued under employment agreements providing for payment after termination of employment for all directors and officers as a group, including those named above, aggregated $225,500 during the fiscal year ended August 31, 1961.

II. EMPLOYMENT OF AUDITORS

The stockholders are being asked to ratify the employment of Arthur Andersen & Co., certified public accountants, to audit the books, records and accounts of the Corporation and its subsidiaries for the fiscal year ending August 31, 1962. They have acted as auditors of the Corporation since 1957.

Recommendation of Board of Directors

The Board of Directors recommends a vote FOR the proposal. The persons named in the accompanying form of proxy have indicated their intention to vote the shares of common stock represented by such proxies FOR the proposal, unless a different intention has been properly indicated on such proxies.

III. STOCKHOLDERS' PROPOSAL

Messrs. Lewis D. Gilbert and John J. Gilbert, 1165 Park Avenue, New York 28, N. Y., have advised the Corporation that each is the owner of 10 shares of common stock, and that they represent a further family interest of 15 shares. These stockholders have notified the management that they intend to present to the meeting the resolution set forth below:

"RESOLVED, that the stockholders of Metro-Goldwyn-Mayer Inc. assembled in annual meeting in person and by proxy, hereby request that the Board of Directors take the steps necessary to provide for elections of directors by cumulative voting, which means each stockholder shall be entitled to as many votes as shall equal the number of shares he owns multiplied by the number of directors to be elected and he may cast all of such votes for a single candidate or any two or more of them as he may see fit."

Messrs. Gilbert have submitted the following statement in support of their proposal:—

"At the last annual meeting 1,357 owners with 143,226 shares voted in favor of our similar resolution. The shares against included those represented by the unmarked and the bulk of the fiduciary proxies.

Cumulative voting was eliminated at the 1959 annual meeting over the protest of the owners of 344,551 shares.

Differences of opinion between management and independent stockholders on such matters as executive stock options make the return of cumulative voting imperative at Metro-Goldyn-Mayer. The sponsors recommend that a QUALIFIED woman be elected to the Board of Directors."

MANAGEMENT'S COMMENTS AS TO STOCKHOLDERS' PROPOSAL

At the Special Meeting of Stockholders on February 24, 1959, in excess of 3,360,000 shares were voted for the elimination of cumulative voting and only slightly more than 340,000 shares voted against the proposal. At the 1960 and 1961 Annual Meetings a similar proposal by Messrs. Gilbert for the adoption of cumulative voting was defeated by 1,589,810 to 152,766 shares and 1,667,369 to 143,226, respectively.

The Directors of Metro-Goldwyn-Mayer Inc. have been selected to bring to the Corporation broad experience and proven competence in the entertainment and other important fields. They have been shown to represent all the stockholders of the Corporation — not a particular group or groups of stockholders. Directors elected through cumulative voting could regard themselves as representing only the special group of stockholders which elected them and not representing stockholders as a whole. The present method of election is in accord with the principle of majority rule, while cumulative voting is a device by which a minority group, through pooling voting power, may elect one or more directors in opposition to the will of the majority of stockholders. Thus, it may well bring about division and conflict among the Directors and interfere with the effective functioning of management as a team.

Cumulative voting is not mandatory in those states where most of the largest corporations of the country are incorporated.

Recommendation of Board of Directors

The Board of Directors recommends a vote AGAINST the proposal. The persons named in the accompanying form of proxy have indicated their intention to vote the shares of common stock represented by such proxies AGAINST the proposal of Messrs. Gilbert for cumulative voting, unless a different intention has been properly indicated on such proxies.

OTHER BUSINESS

The management knows of no other business to be transacted but if any other matters do come before the meeting the persons named as proxies will vote or act with respect to them in accordance with their best judgment.

OTHER INFORMATION

M-G-M will bear all costs in connection with the Management solicitation of proxies. M-G-M intends to request brokerage houses, custodians, nominees and others who hold stock in their names to solicit proxies from the persons who own such stock, pursuant to the rules of the New York Stock Exchange. M-G-M will reimburse said brokerage houses, custodians, nominees and others for their out-of-pocket expenses and reasonable clerical expenses which expenses, it is estimated, will be nominal. In addition, M-G-M has entered into contracts with Georgeson & Company and The Kissel Organization for the solicitation of proxies. M-G-M has agreed to pay to Georgeson & Company a fee of $5,000 and to The Kissel Organization a fee of $2,000 for their services, and in each case out of pocket expenses. In addition, officers and employees of M-G-M and its subsidiaries may request the return of proxies by telephone, telegraph or in person for which no additional compensation will be paid them.

By order of the Board of Directors,

JOSEPH R. VOGEL,
President.

January 18, 1962.

To Nathan Cummings Date February 1, 1962

From E. S. Steinmetz Branch

On glancing through the February 1 issue of Forbes magazine today, I noticed an article on Insiders reports particullary as it relates to insiders profits. In the third page of the enclosed copy I have marked the paragraph which reads as follows:

> "Even the power to punish insiders who profit on short-swing trading is not exercised by the SEC; it depends on the action of the company itself or alert stockholders. In November, for example, Kerr-McGee Oil Industries, Inc. ordered five of its insiders who 'unknowingly' ran up an illegal, aggregate profit of $220,000 on short-term sales to return the money to the corporate treasury. But Mead Johnson & Co. announced it would not compel one of its vice president to pay back a $28,000 profit he had made in similar dealing because the violation was 'completely inadvertent.'"

Apparently both of the above profits were made on the basis of the purchase of stock and its later sale within a six months period.

On the insiders profit which you have repaid to Metro-Goldwyn-Mayer the facts were even more in your favor, as a matter of fairness. The $53,870.81 paid to Metro-Goldwyn-Mayer was in truth a profit made on 3,000 shares purchased some two years ago and sold on April 22, 1961. At this point these profits were legitimate and could not be attacked. Inadvertently a total of 3,000 shares were purchased in September and on October 2, 1961, which was within a six months following the sale in April. In fact, no profit has yet been made on this purchase and, obviously, the purchases were not made because of insiders information. The amount of money paid to MGM constituted the difference between the proceeds from the shares that we sold in April and the cost of the shares that were purchased later. I realize that the law covers this situation, but I question if the law intended a windfall to MGM under such circumstances.

Basically, it seems the purpose of reporting sales and profits is to prevent insiders from making profit on so called insiders knowledge. Quite obviously this was not what occurred here and equally as obvious is the fact that the shares were purchased through "inadvertence."

Petitioner Exhibit 4

Under the circumstances, I firmly feel that Metro-Goldwyn-Mayer should return the $53,870.81 to you and refuse to make claim on you for it.

This would not prohibit some stockholders from making claim, but I wonder how much risk of this is being made.

Sincerely,

E. S. Steinmetz
rd

P.S. The $53,870.81 was paid to MGM the day before its proxy statement was printed so that the statement could be cleared with the SEC.

If MGM returns the money to you and then refuses to make claim for the reasons set forth above, I wonder if you run much of a chance of a stockholder of MGM bringing suit against you to recover the funds for MGM.

/s/

How far "inside" are the insider reports? Answer: not very. Here is what the SEC's compilation of insider trading tells—and does not tell.

VOLUME 27 NUMBER 12

Official Summary

OF SECURITY TRANSACTIONS AND HOLDINGS

On the not implausible theory that the men who run them may be the first to know what's ahead for the nation's publicly held companies, brokers and investors bought up 15,587 copies of the Securities & Exchange Commission's latest *Official Summary of Security Transactions & Holdings*. For $1.50 a year, anyone can receive the best-selling monthly report and keep tabs on whether corporate "insiders" are adding to or reducing their holdings in the companies they steer.* The information is filed in compliance with a provision in the 1934 SEC act aimed at checking manipulation by so-called insiders. Insiders by SEC definition are corporate directors, officers (down to the level of assistant treasurers in some cases) and beneficial owners of more than 10% of any class of a company's registered equity.

To many people the very idea of such reports is intriguing. Yet most informed investment people pay them little heed. They regard the published insider moves as, at best, an erratic barometer of a company's future and, at worst, a downright misleading sign.

"When the law first went through," says the veteran general manager of one big brokerage house, "we thought we'd be out of business if we didn't keep an eagle eye on these reports. Now I'd be surprised if we get more than one order a month based strictly on what the insiders are doing."

Rarely Cryptic. Most trained investors have long since recognized that insider buying does not necessarily presage an upturn in company fortunes or board action that could buoy its stock (e.g., a split, a merger or a dividend increase). Nor can insider selling be reliably taken as a captain scrambling off a sinking ship.

Often the reasons for the reported transactions are quite mundane. Frequently they are of a strictly personal nature. For instance, President Daniel J. Haughton was one of 18 Lockheed Aircraft insiders who, among them, purchased 21,554 shares of the company's common last November. Haughton makes no secret of the reason behind his timing: He wanted to take advantage of stock options. Haughton's purchase of 2,265 shares cost him $16.18 a share under the terms of the option. Lockheed closed at 47¼ on Nov. 1, the day he bought.

At Consolidation Coal, insiders sold 16,100 shares in the September-November span. But nobody was bailing out. "We have a stock option plan," explains Vice President Joseph W. Oliver, who sold 500 shares in October, "and I expect to be in a position to exercise the option. That was solely my reason."

An equally frequent reason for insider sales: Many an executive's wealth is sunk heavily in his company's stock. To build a new home or buy his wife a mink, he must sell off a portion of his holdings. Or he may want to take advantage of a rising market to diversify his holdings or to get his estate in order. Such transactions indicate no lack of confidence in the company's future. In many cases the sale may represent only a small part of the insider's holdings.

Dropping Clues. Investors who focus on the moves of corporate brass will, however, occasionally hit the mark. Take the case of insiders at Avnet Electronics Corp. Some of them started selling heavily (74,400 shares) from June through August after the stock, one of the most volatile issues on the Big Board in 1961, had peaked toward the middle of the year at 63¾. On Sept. 25, after the price had plunged some 42 points below the high, the company announced that earnings for its fiscal year 1961, ended June 30, were off a bit: Avnet's dramatic, five-year growth spurt, in other words, had leveled off.

Or investors might have guessed that then-RCA President Dr. John L. Burns was on the way out when he sold 17,413 shares of RCA stock in October. A New York Stock Exchange press release, based on selected copies of insider trading forms filed with the SEC,† reported the sale Nov. 15; RCA did not announce Burns' resignation until Dec. 1.

Whatever prophetic value insider transactions may or may not have, the intent of the 1934 law governing them was plain enough. The law requires the insiders to report any change in their holdings within ten days after the month in which they occur. It prohibits insiders from selling short their own company's shares. It also gives the company and its stockholders the right to sue to recover any gain realized by an insider on a buy-and-sell cycle within a six-month period.

No Sharp Teeth. In operation, though, the law is rather toothless. Insiders choosing to skirt it have nothing to lose, in fact, but their profits. Each month, dozens of insider transactions are reported late. In fact, the SEC's December 1961 summary listed one sale executed in October 1957. But officials admit, no one has ever been prosecuted by the commission solely for tardy reporting. Most violators explain simply, like Warner-Lambert Director J. K. T. Williams (who bought 3,100 shares of the company last March but failed to report it until Nov.

(CONTINUED ON PAGE 32)

*Reports can be ordered from the Superintendent of Documents, U.S. Government Printing Office, Washington 25, D.C.

†The NYSE report, put out each week, is a quicker way to keep track of insider trading than the SEC's more complete monthly [illegible]

[illegible] failure to file [illegible] already out to [illegible]

INSIDER TRANSACTIONS

Here are the principal insider transactions* in major U.S. corporations as reported to the Securities & Exchange Commission during the last four months of 1961.

Company	Insiders Bought	Insiders Sold	These Insiders† Now Hold
AUTOMOTIVE			
American Motors	37,070(X)	NONE	217,940
Ford	8,000(X)	17,150	95,504
GM	14,950(X)	1,035	82,657
Studebaker	1,800	200	2,300
Goodrich	2,260(X)		
	1,378	100	36,954
Goodyear	6,825(X)	1,400	57,967
Fruehauf	4,037(X)		
	16,838	NONE	47,349
Mack Trucks	2,625(X)	600	4,588
White Motor	3,296(X)		
	2,300	362	55,386
CHEMICALS			
Allied Chemical	1,600(X)	NONE	4,270
Celanese	12,500(X)	1,250**	12,500
Du Pont	NONE	5,685**	190,941
FMC Corp.	5,413		
	500	1,925	16,592
Freeport Sulphur	450	3,875	149,720
Grace, W.R.	2,276(X)		
	1,273	NONE	10,776
Hercules Powder	NONE	11,000	16,515
Minn. Mining & Mfg.	24,045	5,900	5,016,110
Monsanto	6,242(X)		
	19,106	14,831	143,442
Nat. Distillers & Chem.	11,431(X)	100	22,201
Olin Mathieson	1,050(X)		
	2,250	100	6,976
DEFENSE			
Avco	5,000(X)		
	2,600	2,500	28,130
General Precision	497	1,822	21,000
Grumman	NONE	3,140**	125,600
Lear	9,650(X)		
	9,325	900	503,507
Ling-Temco-Vought	1,500(X)	NONE	3,500
	$25,000	NONE	$4,153,200
Purchased: 5½% conv. sub. debs.			
Lockheed	19,626(X)		
	2,930	100	112,789
North American	5,150(X)	4,500	8,000
Northrop Corp.	2,400(X)		
	700	NONE	17,150
Raytheon	NONE	2,900	2,339
ELECTRICAL EQUIPMENT			
Borg-Warner	2,875(X)		
	2,000	100	8,934
General Electric	13,677(X)		
	2,068	4,100	128,178
Gen. Tel. & Electronics	5,745(X)	NONE	10,644
International Tel. & Tel.	7,335(X)	NONE	7,533
Magnavox	NONE	11,800	487,997
Minneapolis-Honeywell	1,000(X)	2,492	45,935
RCA	5,500	19,240	26,005
Singer Mfg.	NONE	5,500(B)	530,012(B)
Sperry Rand	1,803	1,000	10,603
Texas Instruments	NONE	3,000	28,132
Thomp. Ramo Wooldridge	6,000		
	13,332(E)	3,200	100,110
Westinghouse	2,700		
	1,500	13,552	27,654
Zenith	9,720(X)	NONE	25,247

Company	Insiders Bought	Insiders Sold	These Insiders† Now Hold
METALS			
Alcoa	1,700	NONE	12,000
Aluminium, Ltd.	4,000(X)		
	5,000	NONE	26,240
Cerro Corp.	3,100	NONE	29,045
Colorado Fuel & Iron	NONE	13,000	19,133
Granite City Steel	NONE	5,000	4,600
Inland Steel	2,500(X)	NONE	189,600
International Nickel	NONE	9,336	12,743
New Jersey Zinc	66,000(B)	NONE	230,800(B)
Purchaser: Bush Terminal			
Republic Steel	2,000(X)	200	8,550
U.S. Steel	3,300(X)	3,200	13,026
OIL & NATURAL GAS			
Atlantic Refining	1,700(X)		
	800	NONE	14,109
Ashland Oil	NONE	10,531	79,252
Gulf Oil	13,320	1,000	316,235
Kerr-McGee	4,000(X)		
	800	NONE	74,249
Pure Oil	24,000	NONE	27,900
Standard (Ind.)	2,135(X)	NONE	8,106
	4,250(E)	$196,000(E)	
Standard (N.J.)	7,350(X)		
	707	300	26,738
Sunray Mid-Continent	3,410(X)		
	1,500	5,900	43,588
Texaco	1,080(X)		
	500	700	358,097
Union Oil	3,000(X)		
	2,000	3,890	144,763
Columbia Gas	10,100(B)	1,172(B)	322,903(B)
El Paso Natural Gas	NONE	4,200	74,391
Northern Natural Gas	8,000(X)	NONE	28,801
Pur.: Mutual Investors	9,000(B)	NONE	189,000
Panhandle Eastern	100	3,056(B)	781,376
Seller: Missouri-Kansas Pipeline			
Tennessee Gas Trans.	1,000(X)	9,244(E)	
	911	4,241	383,328
Texas Gas Trans.	NONE	9,447(B)	742,618(B)
Seller: J. H. Hillman & Sons			
	500(X)	685	3,357
TRANSPORTATION			
Eastern Air Lines	NONE	1,111	4,300
Northwest Airlines	NONE	1,300	2,805
Pan American	11,000(X)		
	1,500	19,000	122,151
TWA	300	1,400	400
United Airlines	14,670(X)	7,529	46,612
Baltimore & Ohio	$625,000(B)	NONE	$651,000(B)
Pur.: C&O (West. Pocahontas Corp.), conv. debs.			
Chesapeake & Ohio	4,000	NONE	14,200
Boston & Maine	5,246	823	38,601
Chic. & East. Illinois	28,282(B)		273,835(B)
	25,500(B)	23,600	74,104(B)
Louisville & Nashville purchased 28,282 shares and $40,000 of conv. debs.			
Missouri-Pacific purchased 25,500 shares and $400,000 of conv. debs.			
Western Maryland	26,900(B)	600	325,200(B)
Purchaser: C&O			
Western Pacific	5,900(X)		
	400	514	18,100

*All insiders are officers and directors unless otherwise indicated. †Covers only those insiders who reported changes in their holdings; figure is total when there are two or more [illegible]. **[illegible] (A)—Exercise of options; others are market purchases. (B)—Owner of more than 10% of any registered security. (X)—Exchange or conversion.

vember): "I just overlooked it." And only once in its history has the SEC taken out an injunction against an insider for failing altogether to report a transaction. Another loophole: The current law exempts from insider regulations all over-the-counter issues and stocks that were traded but unregistered on exchanges before the 1934 act was passed (including about 10% of the companies traded on the currently spotlighted American Stock Exchange).

Even the power to punish insiders who profit on short-swing trading is not exercised by the SEC; it depends on the action of the company itself or alert stockholders. In November, for example, Kerr-McGee Oil Industries, Inc. ordered five of its insiders who "unknowingly" ran up an illegal, aggregate profit of $220,000 on short-term sales to return the money to the corporate treasury. But Mead Johnson & Co. announced it would not compel one of its vice presidents to pay back a $28,000 profit he had made in similar dealing because the violation was "completely inadvertent."

Tighter Laws? Changes in Section 16 of the act, the part governing insider trading, seem certain as a result of the SEC's current probe of securities markets. Neither SEC Chairman William L. Cary nor Milton H. Cohen, director of the special study, is discussing cures while the diagnosis is still going on, but both have made it clear they think over-the-counter stocks should be subjected to the same regulatory standards as listed issues. Such a view makes likely a renewed effort to extend Section 16 provisions to insider trading in unlisted companies, a step sought by the SEC as long ago as 1946 but never acted upon by Congress.

Another possible, if unlikely, way to sharpen up the law's blunt teeth: impose a $100 fine for each day beyond the filing deadline that an insider fails to report his trades. Such a stinger was asked of Congress in 1959, but again no action was taken.

How Useful? Such a tightening of the laws can go a long way toward making regulation of insider trading more effective. But not all the laws in the world are likely to make insider reports a reliable guide to future market action of a company's stock. The world simply doesn't work that way. No law, for example, can possibly require insiders to give any real insight into their motives for buying or selling. Consider the case of an insider who exercises options. Is he doing so because he wants to own more of the stock? Or is he simply getting ready to cash in his options for a profit once the six-month holding period is past?

And, of course, the hard truth is that the insider can be as wrong as—or even more so than—the outsider. He often tends to see the trees and miss the forest. Too close to his company's day-to-day affairs, he may get worried by temporary reverses—or tend to lose perspective on its small successes.

Moral: Insider reports, like all other kinds of investment information, are worth pondering. But they are more likely than not to lead astray the investor who tries to base his actions entirely on what the reports tell him the insiders are doing.

SULFUR

TRUCE?

Things aren't what they used to be in the sulfur business, but at least the chances for price stability look good in 1962.

PROBABLY no industry has fallen from blue chip to frayed collar status faster than the once-rich sulfur industry. In 1956 Mexico-based Pan American Sulphur, the newest entrant in the field, triggered off a bitter price war. The price of sulfur skidded from $26.50 to $21.50 a ton in 1960. In spite of a solid increase in total U.S. consumption, dollar sales of the biggest sulfur company in the world, Texas Gulf Sulphur Co., fell 30%, and operating earnings dropped 61%. Freeport Sulphur Co. followed the same course: Revenues went down 22%, operating income declined 23%. In 1956 Texas Gulf earned an operating profit margin of a fantastic 58.7%; it earned only some 30% last year.

When 1961 began, however, it seemed there was a chance for the better ahead. The industry called a truce. Pan American jacked up the price of sulfur $2 to $23.50, the first increase in five long and hard years. Rival sulfur companies were happy to follow its lead.

Troubled Peace. Yet, ironically, when 1961 earnings reports began to trickle out last month it became clear the end of price wars had done virtually nothing to help profits. For the full year Texas Gulf Sulphur estimates it will have the worst profits in the past decade: a probable $1.20 a share—down 5% from 1960, and a far cry from the $2.81 a share earned in 1956. At the nine-months mark Pan American's earnings were down 20%.

What had delayed the pickup? In the first place the sulfur industry could only make last year's price hike stick on the Atlantic Coast, around the Great Lakes and in the export market. Elsewhere the price remained depressed. Secondly, the price increase posted in January 1961 became effective only on July 1. And during the intervening months many producers were eager to unload heavy inventories and thus gave customers additional freight discounts. Explains Texas Gulf President Claude O. Stephens: "When the price increase was announced, the industry did not take into account the effect of these larger freight allowances. Thus the increase in July did not do much more than offset the decline in profit margins during the first six months."

A Consolation. But Stephens and rival sulfurmen now have a major consolation: 1962 will be the first year in which the price hike will apply for a full 12 months. "This year," says Stephens, "the price increase will be reflected in a rise in our gross revenues as well as in our net income."

True, no one expects the improvement to be spectacular. The sulfur industry still faces a number of tough problems. The export market is one. Normally exports account for some 20% of U.S. sulfur production. In 1961, however, export volume declined 12% as fledgling French producers took over Europe's Common Market. And, says Texas Gulf's Stephens: "The Canadian market is getting tougher every year." To cap it all the domestic market has more capacity than it currently needs.

Nevertheless, for all these problems, chances are that the current price of sulfur will hold throughout most of 1962. Self-interest should see to that. The demand for sulfur is highly inelastic; neither the industry in general nor any single producer can substantially raise sales volume and crash new markets by cutting the price. Thus, in spite of the industry's uncomfortable economic position, chances for a full year of price stability are better than they have been in many years.

February 6, 1962

Winter Address:
Palm Beach Towers
Palm Beach, Fla.

Mr. Joseph Macchia
Metro Goldwyn Mayer, Inc.
1540 Broadway
New York, N.Y.

Dear Mr. Macchia:

Attached is a report sent to me from my financial assistant who is Vice President of our company, Mr. E.S. Steinmetz, in connection with payment which I made immediately of $53,870.81., when the matter was brought to my attention.

After reading the article in Forbes, which was accompanied by Mr. Steinmetz's letter to me, and thinking the matter ever, I now feel very strongly that the amount should be refunded to me.

If a MGM stockholder should bring suit to recover the funds and be successful, you know I am financially responsible and will meet my obligations promptly.

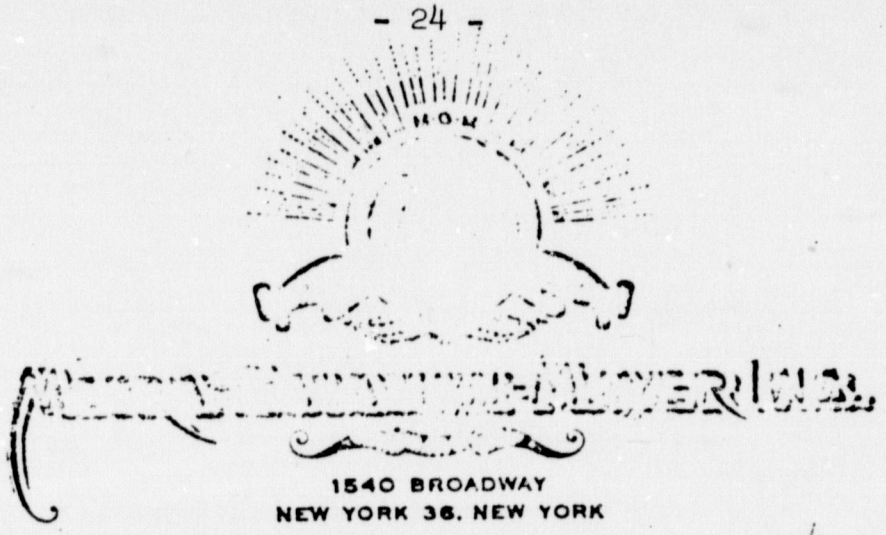
You will, no doubt, want to discuss this matter with Messrs. O'Brien and Melniker. May I hear from you by return mail.

Yours sincerely,

Nathan Cummings
jh

cc: Mr. A.A. Owen
Mr. E.S. Steinmetz
Mr. Robert O'Brien
Mr. B. Meliniker

Petitioners' Exhibit 5



JOSEPH A. MACCHIA
SECRETARY

1540 BROADWAY
NEW YORK 36, NEW YORK

February 9, 1962

Mr. Nathan Cummings
Palm Beach Towers
Palm Beach, Florida

Dear Mr. Cummings:

I have your letter of February 6th in which you request that MGM refund to you the amount of $53,870.81 representing a profit on a sale and purchase by you of common stock of this corporation within a six-month period. I have discussed this matter with Messrs. O'Brien and Melniker.

It is our conclusion that the facts in this situation should be submitted to independent counsel and an opinion from them obtained. Accordingly, we are submitting the facts to Messrs. Davis, Polk, Wardwell, Sunderland & Kiendl. As soon as we have the opinion of this firm, we shall communicate with you again.

Sincerely,

Petitioners' Exhibit 6

February 13, 1962

Winter Address:
Palm Beach Towers
Palm Beach, Fla.

Mr. Joseph A. Macchia, Secretary
Metro Goldwyn Mayer, Inc.
1540 Broadway
New York, N.Y.

Dear Mr. Macchia:

I do very much appreciate the promptness with which you have studied the material submitted to you on February 6, and presume the opinion of independent counsel will be forthcoming comparatively soon.

You know that I sent my check without any delay and feel that you will treat my request in the same manner.

Will be seeing you at the Annual Meeting.

Yours sincerely,

Nathan Cummings
jh

Petitioners' Exhibit 7

February 20, 1962

Metro-Goldwyn-Mayer Inc.
1540 Broadway
New York 36, New York

Attention: Benjamin Melniker, Esq., Vice President
and General Counsel

Dear Sirs:

You have submitted for our opinion the request of Mr. Nathan Cummings, a director of Metro-Goldwyn-Mayer Inc. (MGM) for the repayment to him of the $53,870.81 paid by Mr. Cummings to MGM pursuant to the provisions of Section 16(b) of the Securities Exchange Act of 1934. On April 22, 1962 Mr. Cummings sold 3,000 shares of MGM Common Stock and within six months thereafter Mr. Cummings purchased, in two transactions, 3,000 shares of such Common Stock. We understand that MGM had no notice of Mr. Cummings' sale and purchases until receipt of a letter dated January 16, 1962 from the Securities and Exchange Commission commenting on the proxy material for the MGM 1962 annual meeting of stockholders.

In its letter the Commission indicated the possibility of Mr. Cummings' liability under Section 16(b) and pointed out that the facts regarding Mr. Cummings' stock transactions should be disclosed in the proxy material. The Commission's letter was immediately brought to Mr. Cummings' attention by MGM's Secretary, Mr. Macchia, who advised that the alternatives were disclosure of the ttansactions in the proxy material or payment by Mr.

Petitioners' Exhibit 8

Cummings to MGM of the profit in connection with the April sale. Mr. Cummings' advisor, Mr. Steinmetz, took the matter under consideration and subsequently telephoned Mr. Macchia to advise him that a check would be sent immediately. On receipt of the check, Mr. Macchia discussed with the Commission the elimination of reference to the transactions in the proxy material and was advised by Mr. Martin Behrens Branch Chief, that the Commission would, in the circumstances, withdraw its requirement of disclosure of the Cummings' transactions. Mr. Steinmetz subsewuently called Mr. Macchia to ascertain the Commission's decision. MGM commenced printing its proxy material on January 18 and on January 22 commenced mailing such proxy material to stockholders. Mr. Cummings made his request for repayment in a letter dated February 6, 1962.

Mr. Cummings' request raises two basic questions:

1. Would repayment affect the validity of the 1962 annual meeting of stockholders.

2. Would the directors of MGM have any liability if the repayment should be made.

The Securities and Exchange Commission's insistence on disclosure of Mr. Cummings' stock transactions was based upon Item 7(e) of Regulation 14 issued by the Commission. This Regulation governs the form and content of proxy statements for meetings of stockholders. The Item in question requires inclusion in the proxy material of the identity of each director or officer of the company who was indebted to the company during the preceding fiscal year, the amount of such indebtedness, the nature of the transaction in which the indebtedness was incurred and certain other related information. A director's liability under Section 16(b) pf tje Securities Exchange Act is held to be indebtedness to the company within the meaning of this Item. Since Mr. Cummings' liability under the Act was indisputable its disclosure in MGM's proxy material could not be avoided if the liability were not satisfied. For this reason, if repayment is made to Mr. Cummings we do not believe that you may properly proceed to hold the 1962 stockholders meeting without notifying the Securities and Exchange Commission of all the facts and without distributing the required information to stockholders. Deliberate failure to comply with a clear requirement of the proxy regulations would constitute a

violation of the Securities Exchange Act of 1934 invoking the penalties imposed by Section 32 of that Act, would cast grave doubt on the validity of the entire meeting to which the deficient proxy material related and would place particularly in doubt the validity of Mr. Cummings' election as a director of MGM.

We also believe that it would be improper to proceed with the 1962 annual meeting and thereafter repay Mr. Cummings.

In addition to possible invalidation of the annual meeting, compliance with Mr. Cummings' request could well impose liability on the directors of MGM. Under Section 16(b) a profit such as that realized by Mr. Cummings may be recovered either by the company or, after refusal of the company to sue, by any stockholder. It has been held in the one case on the point that the determination of whether or not a company should make a claim under Section 16(b) against an officer or director is a matter left to the discretion of the directors. Truncale v. Universal Pictures Co. 76 F. Supp. 465 (S.D.N.Y. 1948). However, this decision would in no way support a repayment by directors of Section 16(b) profits once they have been voluntarily paid into the company. In our opinion such a repayment would expose the directors to serious risk of liability for waste of corporate assets since there is no legal basis for repayment.

We might point out that any repayment would have to be disclosed in the supplemental proxy material for the 1962 meeting of stockholders referred to above at the same time disclosure was made of Mr. Cummings' indebtedness to MGM. Disclosure of both items would undoubtedly provoke adverse comment and probably a stockholder claim for recovery from Mr. Cummings if not from the directors. It should be noted that if such a claim occurs Mr. Cummings would have no defense against repayment. In addition, the claimant would claim a percentage of the repayment plus legal fees so that MGM is likely to receive a good deal less than the amount it has already been paid. It is also possible that the directors would be liable for the difference in the absence of any legal basis for returning Mr. Cummings' profits to him.

Very truly yours,

/s/

William D. Tucker Jr.

WDTJr:mhm

Exhibit A

(DO NOT USE THIS SPACE)

FORM 4

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON 25, D. C.

IF THERE HAVE BEEN ANY *CHANGES* IN OWNERSHIP OF ANY EQUITY SECURITY OF THE COMPANY NAMED BELOW DURING THE LAST CALENDAR MONTH, THIS FORM SHOULD BE FILED BY OFFICERS AND DIRECTORS OF SUCH COMPANY IF IT HAS EQUITY SECURITIES LISTED AND REGISTERED, AND BY BENEFICIAL OWNERS OF MORE THAN 10 PERCENT OF ANY CLASS OF LISTED AND REGISTERED EQUITY SECURITIES OF SUCH COMPANY

Report for Calendar Month Ending March 31, 1961

Metro Goldwyn Mayer
(Name of company which issued security)

Nathan Cummings
(Name of person whose change of ownership is reported) (Type or print)

135 South LaSalle St., Chicago 3, Illinois
(Business address: street, city, state)

The relation of the undersigned to the issuer is that of [1] Director

IDENTIFICATION OF SECURITY (Such as Class "A" Common Stock, 5% Preferred Stock, etc.)	The following changes (whether by purchase, sale, exchange, gift, or otherwise) in the amounts of equity securities* of the above issuer owned by the undersigned occurred during the calendar month named above. (Report each transaction separately)			The undersigned owned directly or indirectly as beneficial owner, at the close of the calendar month named above, the following amounts of equity securities* of the above issuer	
	DATE OF TRANSACTION	NUMBER OF SHARES OR UNITS OR PRINCIPAL AMOUNT		NATURE OF OWNERSHIP (Whether direct or through holding company, partnership, etc.)	NUMBER OF SHARES OR UNITS OR PRINCIPAL AMOUNT OWNED AT CLOSE OF MONTH NAMED ABOVE
		BOUGHT (If otherwise acquired, so indicate)	SOLD (If otherwise disposed of, so indicate)		
Common stock	3/23/61		1,000		
" "	3/24/61		1,000		
" "	3/29/61		1,800		
" "	3/31/61		200		
					54,300

-4000
-1800
-0

REMARKS:

Nathan Cummings

Date of report April 5, 1961

One copy of this report should be sent to the Securities and Exchange Commission. One copy should also be sent to each exchange on which any equity security of the issuer is listed unless the issuer has designated a single exchange to receive reports.

1961 APR 10 AM 9:55

[1] Indicate whether an officer (giving title of office), director, or direct or indirect beneficial owner of more than 10 percent of any class of any equity security (giving name of security), or any combination of these.

*The term "equity security" means any stock or similar security; or any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right. (Section 3 (a) (11) Securities Exchange Act)

(SEE INSTRUCTIONS ON BACK)

INSTRUCTIONS FOR FORM 4

1. **Necessity of filing.**—This report should be filed with respect to equity securities of a single company, but only if that company has an equity security listed and registered on a national securities exchange. When no change in beneficial ownership occurs during any month, no report on Form 4 is required for such month.

2. **Time covered by each report.**—Each report should cover a period of one calendar month, and only one such month. The last day of such month should be indicated on the line provided therefor.

3. **Name of company which issued security.**—The name of the issuer of the securities in respect of which changes in ownership are reported should appear on the line calling for name of company which issued security.

4. **Name of person reporting.**—The name of the person whose change of ownership is reported should be the same as that of the person whose signature appears on the report, or in whose behalf the report is signed.

5. **Signature.**—If the person reporting be a corporation, partnership, business trust, etc., the full name of such person should appear over the signature of an officer or other person authorized to sign. If the person reporting be an individual, the report should be signed by him, or specifically on his behalf by a person authorized to sign for him.

6. **Business address.**—The business address should be that of the person by or in whose behalf the report is signed.

7. **Identification of security.**—The security should be clearly identified even though there may be only one class.

8. **Changes in ownership; dates of.**—The date of each transaction should be stated and the number of shares or principal amount involved in each transaction placed in the "bought" or "sold" column, as the case may be.

9. **Changes in ownership; character of.**—If the transaction is other than a purchase or sale, it should be so indicated; e. g., gift, 5% stock dividend, etc., as the case may be.

10. **Changes in ownership; space for reporting.**—If space provided for reporting transactions is inadequate, the transactions for the month may be summarized on the face of the report, with a reference to a detailed daily schedule on a separate sheet.

11. **All month-end holdings should be reported.**—Each Form 4 report required to be filed should not only reflect all changes occurring during the month, but should also state all direct and indirect holdings at the end of the month of *every* class of equity security of the issuer, whether listed or not, *even though no change may have occurred during the month as to certain of such holdings.*

12. **Changes shall be reported even though they are counterbalanced.**—If purchases and sales during a given month are equal, each transaction involved should nevertheless be reported.

13. **Nature of ownership involved in each transaction.**—The nature of ownership (whether direct or through holding company, partnership, trust, etc.) should be specified as to the securities involved in each transaction.

14. **Nature of ownership involved in each type of month-end holding.**—The nature of ownership (whether direct or through holding company, partnership, trust, etc.) should be specified as to the number of shares or principal amount of each class of security shown to be owned at the close of the month.

15. Change in the nature of ownership.—If a change involves only the nature of ownership (e. g., through a change from direct to indirect ownership) such change should be reported, nevertheless.

16. Method of reporting extent of indirect ownership:

(*a*) Where a holding company buys or sells shares of an equity security, say 200 shares, and where A's interest in the holding company is such as to require that he report in regard to such security, he may report in either of two ways:

(1) He may include in his report the entire 200 shares and state that he has an interest in these shares through the holding company; or

(2) He may include in his report only his proportionate interest in such shares, say 123 shares, with an appropriate explanatory notation.

The same method of reporting may be followed in the case of partnerships.

The method adopted in reporting such transactions should be used with respect to holdings as of the close of the month and should be followed consistently in subsequent reports.

(*b*) Where a trust includes shares of an equity security and where circumstances are such as to require that A report in regard to such security, he should include in his report the transactions and entire holdings of the trust in such security, with a notation stating the nature of his interest therein.

17. Identification of types of indirect ownership.—Where more than one type of indirect ownership is involved (e. g., two or more holding companies), each should be separately reported and identified. Such identification may be made by name or by arbitrary symbols, such as holding company "A", holding company "B", etc. Any method adopted should be followed consistently in any subsequent reports.

18. Beneficial ownership.—The reporting requirements relate only to beneficial ownership, direct and indirect, and changes in beneficial ownership. Record ownership does not, of itself, constitute beneficial ownership. A person filing a report may expressly declare therein that such filing shall not be construed as an admission that he is, for the purposes of Section 16, the beneficial owner of any equity security covered by the report.

19. Securities held through nominees.—The fact that securities stand in street name or are held through a broker or other nominee does not, of itself, constitute indirect ownership as distinguished from direct ownership.

20. Date of report.—The report should not be dated prior to the close of the month covered.

21. Date report should be received.—Reports should be received on or before the tenth day of the month following the calendar month for which transactions are reported.

UNITED STATES TAX COURT

NATHAN CUMMINGS and JOANNE T. CUMMINGS, Petitioners, vs. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 2653-71

Room 1743,
Federal Building,
Chicago, Illinois.

Monday, 15 May 1972

Met, pursuant to notice, at 9:42 a.m.

BEFORE:

HONORABLE CHARLES R. SIMPSON

APPEARANCES:

MESSRS. HOPKINS, SUTTER, OWEN, MULROY, WENTZ & DAVIS, by
MR. GLEN H. KAMMIT, One First National Plaza, Chicago, Illinois,
on behalf of the Petitioners.

NELSON E. SHAFER, IRS, Chicago, Illinois.
on behalf of the Respondent.

C O N T E N T S

WITNESS

EXHIBITS

PROCEEDINGS

THE CLERK: Docket No. 2653-71, Nathan Cummings and Joanne T. Cummings.

Appearances for the record, please.

MR. KANWIT: Glen L. Kanwit for Petitioners, Your Honor.

MR. SHAFER: Nelson E. Shafer for Respondent.

THE COURT: Good morning. Would you like to make an opening statement, Mr. Kanwit?

MR. KANWIT: Yes, I would, Your Honor. Just a brief opening statement.

This is an insiders profit case. It turns around the question of whether a payment made by Mr. Cummings of $53,870.81 to MGM in January of 1962 is deductible as an ordinary loss on a business transaction, or in the alternative, transactions entered into for profit, or whether it should be deductible only as a capital loss.

It is the position of the Petitioners that it is deductible as a business loss for these reasons: Mr. Cummings, who is a business executive was director of MGM in 1959 and also in that year acquired a substantial block of MGM stock. As director of MGM, he participated actively in its affairs. He helped improve some of the ways of management that was going

on in MGM and depressed the earnings.

In 1961, Mr. Cummings sold 3,000 shares of MGM stock, and less than six months later he purchased a like number of shares. He did not know at that time that the coupling of these transactions could be done with SEC, with the possible result of an Insiders Section 16 B being claimed against it. In January of 1962, MGM prepared proxy material for submission of its shares and sent a preliminary draft to the SEC and was advised by them that in their opinion the pertinent facts regarding Mr. Cummings' sale and later purchase of the 3,000 MGM shares would have to be disclosed on the MGM proxy statement because in their opinion Mr. Cummings would be indebted to the corporation for the amount of profit that had been computed by matching these two transactions.

When the secretary of MGM received this letter, he immediately informed Mr. Cummings of its contents, and Mr. Cummings paid on the next day the $53,000 to MGM. He did this for two reasons: one, because he wished to avoid the expense and potential embarrassment to MGM that would have resulted in them reprinting its proxy material, and also the directors, they inadvertantly would become involved in the Section 16 B problem.

He also did it because he felt it would reflect on his business reputation, regardless of the fact that the transaction was totally inadvertant. When something like that is reported in the papers often it has reactions that cannot be predicted.

Subsequently Mr. Cummings requested that MGM remit the money he paid, because in his opinion, he should not be liable to the company for a transaction such as this, which was inadvertant. But no refund was ever made. He had no choice but to keep it especially since they sent out the proxy material without any reference to the problem.

Now, we think that the issue is really fairly simple. The twofold reason for Mr. Cummings' payment to MGM establishes it as a payment for business reasons, therefore, deductible under Section 162. Alternatively, because Mr. Cummings was a substantial sharehold of MGM and became a director for the purpose of enhancing his position in the management end, it would be deductible under Section 211 of the Code.

That is all I have, Your Honor.

THE COURT: Mr. Shafer.

MR. SHAFER: May it please the Court.

Petitioner, Nathan Cummings, was a stockholder and director of MGM. In April, 1961, he sold

3,400 shares of his MGM stock and within six months he repurchased 3,000 shares of MGM stock. In 1962, Mr. Cummings paid to MGM $53,870.81, representing the difference between the purchase price of the 3,000 shares and the April, 1961 sale of an equivalent number of shares.

This payment, which was apparently prompted by Petitioners' potential liability to surrender his so-called "insiders profit" to MGM, is allegedly deductible under Sections 162 or 165, as Counsel has just indicated.

Respondent determined that the subject payment is only allowable as a long-term capital loss. It is submitted that the payment is not related to any particular trade or business of Mr. Cummings. At best it is a capital expenditure incident to a stock investment, and only incidentally connected -- if at all -- with some alleged trade or business.

Moreover and regardless of the attempted theoretical justifications for Mr. Cummings to make the payment, Respondent submits that they are overriden by the Arrowsmith doctrine. Respondent realizes that this Court rejected the Arrowsmith rationale in James E. Anderson, 56 TC 1370, 1971.

However, the current case involving Mr.

Cummings presents an unresolved issue noted by Judge Dawson in his Anderson dissent that is, whether a corporate director who receives minimal directors fees from a corporation is entitled to an ordinary loss deduction in a situation similar to what we have here.

Judge Dawson thought not. Respondent concurs in that view.

And at this time, we would like to offer the stipulation of facts with attached Petitioners' Exhibits 1 through 7.

THE COURT: Any objection to the admission of those exhibits?

MR. KANWIT: No, Your Honor.

THE COURT: Mr. Shafer, I gather you do not object?

MR. SHAFER: No, Your Honor. I think some of them may have questionable relevancy but --

THE COURT: All right. The stipulation and Exhibits 1 through 9 --

MR. SHAFER: 1 through 7.

THE COURT: -- 1 through 7 are admitted.

[8]

(The stipulation of facts and the documents previously marked for identification as Petitioners' Exhibits 1 through 7 were received in evidence.)

THE COURT: All right. Mr. Kanwit, would you like to present your evidence?

MR. KANWIT: Yes. Except that it is Exhibits 1 through 8.

MR. SHAFER: I beg your pardon.

MR. KANWIT: Your Honor, I would like to call Nathan Cummings to the stand to testify.

NATHAN CUMMINGS

was called as a witness on his own behalf, and, having been first duly sworn, testified as follows:

THE CLERK: You are one of the Petitioners in this case?

THE WITNESS: Yes, sir.

THE CLERK: Thank you.

MR. KANWIT: Can we go off the record.

(Discussion off the record.)

DIRECT EXAMINATION

BY MR. KANWIT:

Q State your name, please?

A Nathan Cummings.

Q Where do you live?

A On a hundred East 50th Street, New York.

Q What is your occupation, sir.

A I am chairman of the executive committee of Consolidated Foods Corporation and also honorary chairman and its founder.

Q How old are you, Mr. Cummings?

A I am 75, going on 76.

Q Mr. Cummings, how long have you been associated with Consolidated Foods?

A I founded the company in 1939.

Q Have you been associated with it ever since then?

A Yes, sir.

Q What were its sales in 1939 when you founded it?

A When we took over the corporation, the sales were about $16,000,000 a year.

Q And what are they today?

A About a billion seven hundred million a year.

Q Have you served, Mr. Cummings, with any other companies in capacity as officer or director?

A Yes, sir.

Q Which companies?

A I am chairman of Associated Products. I am

a director of General Dynamics, and I also am a member of its executive committee, and I am chairman of the merger and acquisition committee.

Q Do you hold the stock in those companies?

A Yes, sir.

Q What purpose are you a director in those companies, Mr. Cummings?

A To see that the company is well run at a profit.

Q And how do you attain that purpose?

A Well, that is a combination of things. I work hard. I enjoy it. I somehow manage to operate at a very low expense basis, and we made a profit for the past 17 years.

Consolidated Foods each year has improved on its sales and its net earnings.

Q What is it that you contribute to those companies as director?

A I attend the meetings of the directors. I attend the executive committee meetings. I meet with the officers and discuss modus operandi, and I try to improve on the activities of the corporation.

Q Mr. Cummings, it has been stipulated that you had been elected a director of MGM in 1959.

Would you describe for us the circumstances

of your election as director of MGM in that year?

A Yes, sir. I was called just before Christmas of 1959 to buy a large block of shares in MGM, which was being badly run, from all the things that I have been told, and they also told me if I would become a director, they would see that three other directors would resign, because they were somehow getting involved in bad feelings amonst the other directors and some of the shareholders.

I bought the block of shares and went on the Board of Directors.

Q As a director of MGM, did you participate actively in the management of its affairs?

A To the extent that I attended all of the board meetings and went out to California to see all of the property to see what I could do to see to it that it was run properly.

Q For what purpose did you go on the Board of Directors of MGM?

A To make a profit for a business purpose.

Q What did you do as a member of the Board of Directors of MGM, if anything, to attempt to improve their corporate management and use of assets?

A I think I was responsible for the resignation of the president of the company, Mr. Joe Vogel,

because I kept on insisting that he ought to cut down on expenses.

He had an arrangement with the man who was chairman of the board who was paying $25,000 a year to a year from the company.

He promised me that in one year that arrangement would be cancelled. The end of the year. He told me an untruth, and said he never made such a statement to me, and of course, this upset me very much. And I kept on insisting that they had to cut down in expenses. Ultimately Mr. Vogel was cut out and Mr. O'Brien was made president.

Q Did you contribute your financial and business judgment to MGM during the period you were a member of that company?

A I think so.

Q Now, Mr. Cummings, I show you a document which has been marked as Exhibit 1 and attached to the stipulation of facts, which was previously filed in this case.

A I have a copy here. (Indicating.)

Q And with the Court's indulgence, I would like to read part of that letter.

THE COURT: No. It is already in the record, so we need not read it, Mr. Kanwit.

[13]

MR. KANWIT: It simply sets the stage for whatever happened next, and it is not long, Your Honor.

THE WITNESS: I will do as I am told, Your Honor.

THE COURT: Are you going to read it or do you want Mr. Cummings to read it?

MR. KANWIT: I will read it, because it is not a letter that he wrote. It is a letter from Martin A Behrens, Branch Chief of the Securities and Exchange Commission, dated January 16, 1962, and addressed to Joseph A. Macchia, Secretary of MGM -- commencs on the preliminary proxy soliciting material was received by the SEC on January 9, 1962 -- and I quote: "It is noted from his ownership reports on file with the Commission that Mr. Nathan Cummings purchased 3,000 shares of the Company's common stock during September and October, 1961, after having sold a like amount within six months prior to such purchase. If he has realized any material profits from these transactions which under Section 16-B of the Securities Exchange Act of 1934 inure to and are recoverable by the issuer, the pertinent facts with respect to these transactions should be disclosed in the proxy statement pursuant to Item 7E."

Mr. Cummings, was the situation described in this paragraph which I have just quoted called to your attention?

A Yes, sir. Joseph Macchia got in touch with my office. At that time I had a personal financial assistant, a person by the name of Ed Steinmetz, who unfortunately died a few months ago.

I had told Eddie Steinmetz that these two transactions apparently were going to mess up the proxy statement, and he said to me that I had a profit of $53,000 that was involved, and I promptly said, "Well, we don't want to mess up the handling of the proxy material."

Furthermore, some people might not thoroughly understand it, and the name of Nathan Cummings would be involved in a transaction of that kind that was not clearly understood, and my being the largest shareholder in MGM at the time, as a personal shareholder, I felt the thing to do was to immediately send them a check, which went there the next day.

Q Now, when you referred to a possible reflection on the name of Nathan Cummings, what did you mean by that?

A Well, I think the most important asset that

I am privileged to own is the reputation for integrity and that I do business in a businesslike way. I must admit that this transaction was inadvertantly handled. I did not follow it. When you run such a large business such as Consolidated, and when you are an investor in other situations and you are just a businessman and not a lawyer, you don't have time to watch all of these details.

And furthermore, I didn't watch the calendar to see which date I bought or what date it was sold, but it is always in my mind -- and still is -- that this is a business purpose.

Q Did you ever receive a formal demand from MGM for the payment of the fifty-three odd thousand dollars?

A Not as a formal demand, but as a suggestion that it would be very cooperative if I would do it.

Q What would have happened, as it was described to you? What would have been the consequence of your not having made the payment to MGM?

A There would have been a lot of questions and probably shareholders might sue the company for return of their funds. There are such lawyers around, I am told, but fortunately I don't have to deal with them.

Q And I believe you testified that you did

make the payment --

A Immediately. The next day.

Q Will you refer, if you will, to Exhibit 2, which has been marked and attached to the stipulation of facts?

A Yes, sir.

Q Is that the cover letter accompanying the payment?

A Yes, sir.

MR. KANWIT: Should I read it to His Honor?

THE COURT: No. It is in the letter.

BY MR. KANWIT:

Q Now, as a result of the payment made by you, was the insiders problem disclosed on the MGM proxy statement?

A It was not necessary. It was paid.

Q Referring, if you will, to Exhibit 3, which has been marked and attached to the stipulation of facts, is that the proxy statement that was ultimately sent out by MGM?

A Yes, sir. Dated January 18, 1962.

Q Does that contain any reference to the insiders profit problem?

A No, sir.

Q Mr. Cummings, did you ever request that the

fifty-three odd thousand dollars paid by you to MGM be refunded?

A Yes, sir.

Q On the basis of what information?

A Because on February the 1st Ed Steinmetz wrote me a memorandum attached to the article which appeared in Forbes Magazine, and I wrote to Mr. Joe Macchia, and sent him a copy of Ed Steinmetz' letter --

Q Let me stop you there.

Referring to Exhibit 4, is that the memorandum that Mr. Steinmetz sent to you which you previously referred?

A Yes, sir.

Q And you said that when you received that, you subsequently wrote to Mr. Macchia?

Refer, if you will, to Exhibit 5.

A Yes, sir.

Q Is that the letter that you wrote to Mr. Macchia?

A It is.

Q And we won't read it into the record.

Was that the letter in which you requested the refund from MGM?

A Yes, sir.

Q Did you receive a reply from Mr. Macchia.

A Yes, sir.

Q Refer, if you will, to Exhibit 6.

Is that the reply to which you refer?

A That is the reply, dated January 9th.

Q Did you reply to Mr. Macchia?

A Yes, sir.

Q Refer to Exhibit 7.

Is that the reply to which you refer in your testimony?

A That is it, in February, 1962.

Q Did you receive a response from MGM concerning your response to the refund after your letter to Mr. Macchia?

A Yes, sir.

Q Refer, if you will, to Exhibit 8.

Is that the response to which you testified?

A Yes, sir.

Q Did MGM ever pay you the refund of the fifty-three odd thousand dollars?

A No, sir.

Q From the time the transaction was first called to your attention to the present, have you ever conceded that you were in fact liable to MGM for the insiders profit payment which you made in January of 1962?

A Not only that, but they should have sent me back my money.

MR. KANWIT: Your Honor, I have no further questions of this witness.

THE COURT: All right. Cross examination, Mr. Shafer?

MR. SHAFER: Yes, Your Honor.

CROSS EXAMINATION

BY MR. SHAFER:

Q Mr. Cummings, just a point of information.

Initially, is it correct that back prior to 1960, MGM was then known as Loew's Incorporated?

A I think that is right.

Q But for all our purposes, we can refer to that company as MGM, being one and the same?

A Yes, sir. But now that you ask that question, I think the original shares were Loew's Incorporated, and shortly thereafter they were split.

Q But for our purposes, we can refer to them interchangeably, is that correct?

A Yes, sir.

Q And these shares you purchased in 1959 were traded on the New York Stock Exchange, were they not?

A Yes, sir.

Q Now, the stipulation of facts, Paragraph 5

refers to your acquisition of your 51,500 shares of the MGM stock.

And what was the cost of those shares?

A I don't remember, sir.

Q Were they approximately $20 or more a share?

A Oh, dear. In the low twenties, as near as I recall.

Q Did you purchase or acquire any other shares in MGM through 1961?

A Through 1961?

MR. KANWIT: Do you mean through December 31st, 1961?

MR. SHAFER: Yes.

BY THE WITNESS:

A Well, I think I purchased this small block, didn't I? I can't remember unless I look at some documents, here, that might refresh my memory.

I can't remember, sir.

MR. SHAFER: Would you mark that for me.

THE CLERK: Respondent's Exhibit A has been marked for identification only.

(The document referred to was marked for identification as Respondent's Exhibit A.)

BY MR. SHAFER:

Q I hand you what has been identified as Respondent's Exhibit A for identification, and ask if you can identify that document?

A I can identify my signature, yes, sir.

Q Is that a report submitted to the Securities and Exchange Commission by you or on your behalf?

A On my behalf, and signed by me. Eddie Steinmetz prepared it.

Q And does that indicate the number of shares held at the end of March 31, 1961, in Moetro-Goldwyn-Mayer?

A Yes, sir.

Q And that was after disposing of approximately 3,000 -- 4,000 shares during March of 1961?

A Just a moment. That is 4,000 shares -- well, it is over here (Indicating).

Q And then during 1961, you would have had then, before this disposition at least, you would have had at least 58,000 shares, is that right?

A I presume so. I don't know. I don't see anything before. I only see this figure.

Q When you say "this figure," you are referring to 54,300?

A That is what it says.

Q And that is after the disposition of 4,000?

A That is what it says.

MR. SHAFER: I offer in evidence Respondent's Exhibit A for identification.

THE COURT: Any objection, Mr. Kanwit?

MR. KANWIT: Your Honor, I don't see how it is relevant, so I object to it on the grounds of relevancy.

MR. SHAFER: It is indicate the substantial investment that this gentleman had, and at least the minimum number of shares that he had in 1961.

THE WITNESS: I have told you I had a substantial investment.

MR. KANWIT: Your Honor, this has been stipulated.

MR. SHAFER: I am coming to the cost next. I am trying to determine, first of all, how many shares he had, and I want to determine the cost of these shares that he had in the company.

THE COURT: Well, I will proceed on the basis of each party submitting the evidence that it thinks is relevant to support its view, and though I don't understand where Mr. Shafer is going, I will admit it.

Exhibit A is admitted.

(The document previously marked for identification as Respondent's Exhibit A was received into evidence.)

MR. SHAFER: I would like to confer with Counsel just a moment, Your Honor.

THE COURT: Yes. Go ahead.

MR. SHAFER: We have an oral stipulation that we would like to make at this time.

We are understandably, I believe, reluctant to submit Mr. Cummings' entire tax return for any years because of Mr. Cummings' position.

THE COURT: Yes.

MR. SHAFER: So that for that reason, we will propose to stipulate that the entire block of stock sold by Mr. Cummings in 1961 had a cost basis of $784,820.25.

THE COURT: All right.

MR. KANWIT: Again, Your Honor, without any concessions as to relevancy.

THE COURT: Yes. All right.

BY MR. SHAFER:

Q Did you own ten per cent or more of the stock in MGM?

A Oh, I don't remember how many shares were

outstanding. That is easily determined. I don't remember.

Q Now, talking about your original acquisition of MGM stock, isn't it a fact that you were originally elected a director by the other directors at a directors' meeting in January of 1959?

A Not January, 1959, I would think. Wasn't it '50 --

Q Were you originally elected a director by other directors or by the stockholders?

A I don't remember, now.

Q Isn't it a fact that you were elected to fill the vacancy created by a Joseph A. Tomlinson?

A Three directors resigned, and I was elected as a director. Whether it was done by a directors' or by shareholders, I can't remember. Whatever the proper procedure, I presume it was done.

Q And isn't it a fact that you acquired your stock only a short time before becoming a director?

A That is correct.

Q And that block of stock was a 235,000 share acquisition by yourself and your brother and another individual?

MR. KANWIT: I object to what Petitioner's brother and another individual did. It is wholly

irrelevant.

THE COURT: What is the purpose of this inquiry?

MR. SHAFER: Again, Your Honor, I believe it shows a part of a substantial investment by a group represented in effect by Mr. Cummings as director of the board. Now, we can talk about business purposes, but I think that what we have is a 235,000 investment by a group in which Mr. Cummings was a participant.

THE COURT: Is there an unanswered question, Mr. Shafer? Do you want to repeat it or do you want the reporter to read it back?

BY MR. SHAFER:

Q Was your purchase of 235,000 shares of stock purchased by yourself, your brother and another individual?

A I don't remember the number of shares. I remember my brother purchased some shares and a man from Toronto purchased some more.

Q And do you recall approximately how many shares?

A I do not.

Q Did they purchase as much or more than you did, in the first place?

A I don't think so.

Q Did you have an MGM stockholders meeting in February of 1959?

A I wouldn't remember, now.

Q Do you recall at any stockholders meetings after you became elected director reporting to a question of the audience that you supported the Company's management?

A Yes, sir.

Q And isn't it a fact that the gentlemen who resigned did not support the Company's management?

A (No response.)

Q You referred previously to three individuals who resigned as directors?

A That is right.

Q And they did not support the Company's --

A That is correct.

Q And isn't it a fact that in response at that same time that you advised the people that you had bought your stock in the company as an investment?

A Yes, sir. Yes, sir. What else would I buy it for?

Q And with respect to the 1962 payments, did you make any other claim or defense to avoid payment other than what you refer to in Exhibit 4?

In other words, Exhibit 4 was the only basis

that you had for indicating that you should have gotten a refund of your money?

A I don't remember any other reason.

Q Do you know of any other lawful claim or defense that you would have to avoid such a payment?

A I am sorry. I am not a lawyer.

Q You have not been advised of any?

A Not that I remember.

Q Since Consolidated Foods was founded, is it correct to state that you have been its chief executive officer responsible for its day to day operation?

A In the beginning, but not in the latter years.

Q And when you say "the latter years," what do you mean?

A I became chairman of the executive committee a few years ago, and we have a chairman and chief executive officer who runs the company.

Q Through 1962, was this your principal activity, business activity?

A As I recall, yes, sir.

Q It was your principal source of income, salary, other than investment income?

A Repeat that, please.

Q Was that your principal source of income

other than, let's say, dividend income?

A Yes, sir.

Q If you will refer to Paragraphs 3 and 4 of the stipulation, it refers to a number of companies to which you were a director?

A Yes, sir.

Q Now, the first company is Associated Products, Incorporated?

A Yes, sir.

Q In 1962, how much time did you spend as director on behalf of Associated Products?

A. Oh, my -- whenever it was necessary on the telephone, whenever I had to attend a meeting. I didn't keep a time check on myself. I still work seven days a week and eight or ten hours a day to do whatever I think is necessary.

Q How much time did you spend with Rothschild Enterprises?

A Whenever it was necessary, without any specific time checks.

Q How much did you spend with College Inn Food Products Company?

A The same.

Q How much time was spent with Monarch Fine Foods?

A The same.

Q How much time was spent with MGM?

A The same.

Q How much time was spent with Rival Packing Corporation?

A Rival Packing would be a part of the Associated Products, so it would be about the same.

Q Did anyone or any combination of these take you as much time to conduct the operations as Consolidated Foods?

A Sometimes my associates thought more.

Q Then, in which company and how much time?

A I don't punch any time clock. I am involved in many businesses even now. Last week I came here on Monday for a Monday General Dynamics meeting and went back to New York for another meeting and came back here for another meeting.

Q How much income did you realize from Associated Products, Incorporated in 1962?

A I don't remember, now.

Q Did you receive fees in any of those companies other than MGM?

A I think I probably get $50 a meeting or a hundred dollars a meeting if I want to bother with it. Sometimes I don't get any fee. I am not a

director for the fees I get out of it. I am a director because I have an investment in the shares of a company.

MR. SHAFER: Mark this Respondent's Exhibit B for identification.

(The document referred to was marked for identification as Respondent's Exhibit B.

BY MR. SHAFER:

Q Mr. Cummings, I hand you Respondent's Exhibit B for identification, and ask you if you can identify that document?

A I can't the first page. I may, further. I do. This is my signature. Yes, sir.

Q And is that the 1962 federal tax return filed on behalf of yourself and your wife?

A It says so.

Q Directing your attention to a part entitled "Schedule B, Part 5, other income or losses."

A Yes, sir.

Q There is an item entitled "Moetro-Goldwyn-Mayer director's fee."

A $5,000.

Q And would that be the approximate fee that you'd have received from Moetro-Goldwyn-Mayer in any

given year?

A If it says that, it must be so.

Q Now, directing your attention to that return or anyplace else where there is any indication of ever receiving any other director's fees?

A I don't know.

Q If you would, take a moment to study it.

A You have about 20 pages of documents here. I can't tell you this by --

MR. KANWIT: Your Honor, if Mr. Shafer has examined a return and will represent to this Court that there are no other fees that are listed on it, it certainly will be stipulated.

MR. SHAFER: I have found none, Your Honor. I will leave the return with Mr. Kanwit to examine further. If there are any, I will stand corrected.

I do not wish to submit the return in evidence.

THE COURT: Yes, I understand.

BY MR. SHAFER:

Q Now, when you testified that you had the stock as an investment, I would like to just direct your attention to one other thing; that is the dividend income from your MGM shares, and state that for the record, if we may, we stipulate that the

dividend income from Moetro-Goldwyn-Mayer was $89,512, in 1962.

THE COURT: Is it so stipulated, Mr. Kanwit?

MR. KANWIT: Yes, Your Honor.

BY MR. SHAFER:

Q Do you still have your stipulation in front of you?

A Is this the stipulation (Indicating)? Just a second. Yes, sir.

Q All right. Directing your attention to Paragraph 3, can you identify the period of time that you were a director of any of the companies other than Moetro-Goldwyn-Mayer?

A I couldn't remember that, now.

Q Paragraph 4 refers to companies in which you were a director, such as Bon Ami, City Stores and Kay Woodie.

Could you identify the period of time you were a director of those companies?

A I can't tell you that, sir. But I can tell you that Kay Woodie was associated with Associated Products.

Q In Paragraph 4, also, it states that since 1962 you were a director of a number of companies such as the Society Corporation, Western Union and General

Dynamics.

What period of time have you been a director of those companies?

A Now, let me just stop and think, please. The Society National Bank -- oh, up until about a year or two ago, I was a director for possibly two years or three years. I don't remember exactly.

MR. SHAFER: One other oral stipulation, Your Honor, at this time. The reported salary income for Mr. Cummings from Consolidated Foods in 1962 was $100,000.16.

MR. KANWIT: Your Honor, I believe Mr. Cummings had not finished with his answer.

MR. SHAFER: I beg your pardon. I am sorry.

MR. KANWIT: You asked him with respect to the three companies, and he answered only with respect to the first. The other two were Western Union and General Dynamics.

BY THE WITNESS:

A Western Union Telegraph must be seven or eight years ago for a period of not very long. I just don't remember.

General Dynamics, I became a director about two and a half years ago, and I am a very active director.

MR. SHAFER: All right.

THE COURT: As to the stipulation of salary, do you so stipulate, Mr. Kanwit?

MR. KANWIT: Yes, I do, Your Honor.

BY MR. SHAFER:

Q You previously testified that you were responsible for Mr. Vogel's resignation from MGM.

Do you recall when that resignation occurred?

A I suppose a couple of years or a year after or -- I suppose a couple of years. I don't remember exactly, sir.

Q Do you recall how many directors MGM had around 1959 and 1960?

A I can tell by the proxy statement here. I can't remember, but I can count them up for you, if you want me to.

Q Isn't it a fact that they originally had 19 and then they had 15 thereafter?

A I think I told you that three resigned when I went on, and that was one of the conditions.

Q In the February, 1959 shareholders meeting, isn't it a fact that the number of authorized directors was reduced from 19 to 15?

A I don't remember.

Q Were there at least 15 directors on the

board at all times when you were associated with them?

A If the proxy says so, yes.

Q When you are referring to the proxy, you are referring to Exhibit --

MR. KANWIT: 3.

BY THE WITNESS:

A Pardon me. While I find it here.

Yes, sir.

BY MR. SHAFER:

Q Page 1 of that exhibit says "One of the purposes of the meeting is to elect 15 directors."

Is that the number of directors?

A Yes, sir, that is what it says.

Q And are those 15 directors all charged with the same responsibilities as you previously outlined?

A Certainly.

MR. SHAFER: No further questions, Your Honor.

THE COURT: Any redirect, Mr. Kanwit?

MR. KANWIT: Just one or two questions, Your Honor.

REDIRECT EXAMINATION

BY MR. KANWIT:

Q Mr. Cummings, referring, if you will to Exhibit 3, and particularly on Pages 1 and 2, the

listing of the directors proposed for election at the February, 1962 annual meeting of MGM, and going down the list, which of those directors were as active or more active than you were in the management of MGM affairs?

A Ira Guilden, who was chairman of the executive committee; George Killion, who was chairman of the board of directors; Bob O'Brien, who was then the executive vice president and subsequently became the president, and he was a former SEC counsel, I believe; Philip Roth, who is a vice chairman of the executive committee; and Joseph Vogel, the president.

Q Now, am I correct that all of the names that you have mentioned were individuals who were also officers of MGM?

A Let me just look again, now, sir. Oh, another one is Benjamin Melniker. Yes. He was vice president and general counsel. Guilden, who was chairman of the executive committee was an officer, Killion was an officer, Melniker was an officer, Roth was an officer -- yes, sir, that is correct. Vogel was an officer.

Q How would you describe the general degree of participation in MGM's affairs with relation to the directors of MGM who were not also officers of the

company?

A Oh, I gave it more time and attention than they did.

Q Now, Mr. Shafer asked you if at the 1959 annual meeting of MGM you supported management.

Wasn't management at that time involved in a proxy fight?

A They were about to be in a proxy fight, and I stopped the fight by buying the shares. They called off the fight, then.

Q Was that the respect to which you supported management at that time?

A Was that the respect? You mean was that the cause?

Q That is right.

A Yes, sir.

MR. KAMMIT: Your Honor, I have no further questions.

THE COURT: Do you have any recross, Mr. Shafer?

MR. SHAFER: Just a couple of questions, Your Honor.

RECROSS EXAMINATION

BY MR. SHAFER:

Q When you say that you spent more time, that you gave more time and attention to the affairs of the company -- MGM -- than the other directors similarly situated, can you give us an idea how much time you spent and how much time they spent?

A I can't measure it that way. I might be on the phone talking to Joe Vogel, and I might be coming to New York and meeting them at their executive headquarters, and I would go there and have lunch with them.

I told you earlier, I was not punching a clock and keep track of my time.

Q And were the other directors also meeting and conferring at the same time?

A Not as much. Those who were full time officers, yes.

Q How much time did the other directors spend, then?

A I was not there, sir, to answer you. I don't know.

Q Referring to the proxy fight, isn't it a fact --

A I never had a proxy fight.

Q The threatened proxy fight that Mr. Kanwit alleged.

That had been threatened by a Lewis A. Green, is that correct?

A I thought that it was threatened by the other fellow.

Q Mr. Tomlinson?

A Tomlinson. I am not positive, but I think so.

Q And it is Mr. Tomlinson whose place you took on the board of directors?

A Well, three resigned, and I went on. I don't know who I replaced exactly. I know I replaced one of them. It could have been Tomlinson.

Q And were these shares, or some of the shares that you acquired before you became a director acquired from Mr. Tomlinson?

A Yes, sir. Through a Mr. Green.

MR. SHAFER: No further questions, Your Honor.

THE COURT: Thank you, Mr. Cummings, for coming as a witness, and you may be excused now.

THE WITNESS: Your Honor, thank you very much.

THE COURT: Thank you.

(Witness excused.)

MR. KANWIT: Your Honor, I have no other witnesses, and that concludes my case.

THE COURT: All right. Let's get the record straight, now.

Was there a stipulation that he received no other directors' fees or at least the return reported no other directors' fees.

MR. KANWIT: Yes, Your Honor. I checked the return and I am satisfied that the only fee reported on that return is the $5,000 for MGM.

THE COURT: Does the Respondent wish to offer any evidence?

MR. SHAFER: No further witnesses or evidence, Your Honor.

THE COURT: That closes the record in this case.

Gentlemen, as I indicated Monday, I prefer seriatim briefs. Mr. Kanwit will make the opening brief, Mr. Shafer the answering brief, and you (referring to Mr. Kanwit) the reply brief.

What period of time would you like to supply the brief?

MR. KANWIT: Well, I don't know how fast I can get the transcript.

THE COURT: Frankly, I am very liberal in the time I give you, Mr. Kanwit. I rather you take enough time now, rather than to have to process an extension.

MR. KANWIT: Okay. I would like 60 days, Your Honor.

MR. SHAFER: I would like 45 for my answer.

THE COURT: Forty-five.

For your reply, Mr. Kanwit, to that?

MR. KANWIT: Twenty, Your Honor.

THE COURT: I think you better take 30. Keep in mind that it has to be served on you by mail.

MR. KANWIT: Fine.

THE COURT: All right. What will be those dates. That was 60 --

MR. KANWIT: Sixty, 45 and 30.

THE CLERK: The original will be due July 17th, 1972. The reply will be given August 31st, 1972. And the next one will be due October 2nd, 1972.

THE COURT: Did you get those dates?

MR. KANWIT: Yes, Your Honor.

MR. SHAFER: Yes, Your Honor.

THE COURT: All right. Does that complete everything in this case, gentlemen?

MR. SHAFER: I thank the Court and the

people in the next case for allowing us to interrupt for a short time.

THE COURT: Good. Fine.

We will take a recess, now.

(Whereupon, at 10:37 a.m., the trial in the above-entitled matter was closed.)

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60 T. C. No. 11

UNITED STATES TAX COURT

NATHAN CUMMINGS and JOANNE T. CUMMINGS, Petitioners v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 2653-71. Filed April 23, 1973.

P was a director and shareholder of MGM, and in 1962 he made a payment to MGM of $53,870.81 when the SEC indicated that P might be liable to MGM for such amount as an insider's profit within the meaning of sec. 16(b) of the Securities Exchange Act of 1934. Held, under the particular circumstances of this case, the payment is an ordinary and necessary business expense of P.

Anderson A. Owen, Edward W. Rothe, and Glen H. Kanwit, for the petitioners.

Nelson E. Shafer, for the respondent.

SIMPSON, Judge: The respondent determined a deficiency of $45,790.18 in the petitioners' Federal income tax for 1962. The only issue for decision is whether the petitioner may deduct as a business expense under section 162(a) of the Internal Revenue Code of 1954,[1] or as a business loss under section 165(a), a payment of $53,870.81 which he made to MGM in 1962 when the Securities and Exchange Commission indicated that he might be liable to MGM for such amount as an insider's profit within the meaning of section 16(b) of the Securities Exchange Act of 1934.

FINDINGS OF FACT

Some of the facts were stipulated, and those facts are so found.

The petitioners, Nathan Cummings and Joanne T. Cummings, are husband and wife, who maintained their residence in New York, New York, at the time their petition was filed in this case. They filed their 1962 joint Federal income tax return with the district director of internal revenue, Chicago, Illinois. Mr. Cummings will be referred to as the petitioner.

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[1] All statutory references are to the Internal Revenue Code of 1954, except that any reference to section 16(b) is to such section of the Securities Exchange Act of 1934.

During 1962, and since 1940, the principal occupation of the petitioner has been that of chairman of the board and chief executive officer of the Consolidated Foods Corporation (CFC). CFC was founded in 1939 by the petitioner, and it is now a leading processor, canner, and distributor of food products, with present sales of $1.7 billion a year, as compared with sales of $16 million in 1939 and approximately $500 million in 1962.

During 1962, the petitioner was also a director and shareholder of Associated Products, Inc., Rothschild Enterprises, Inc., the College Inn Food Products Co., Monarch Fine Foods, Ltd., Metro-Goldwyn-Mayer, Inc. (MGM), and the Rival Packing Corporation. Prior to 1962, the petitioner was a director and shareholder of the Bon Ami Corporation, the City Stores Company, and the Kay Woodie Company. Sometime subsequent to 1962, the petitioner was a director and shareholder of the Society Corporation, the Western Union Telegraph Company, and the General Dynamics Corporation. As a director, the petitioner attended meetings with directors, executive committees, and corporate officers to help improve on activities of the corporation and see that it was well run at a profit.

In 1959, the petitioner was approached with a proposition to purchase a large block of MGM stock. He was

told that the corporation was having problems and that if he would become a director, 3 directors who were involved in controversy would resign. Subsequently, the petitioner purchased 51,500 shares of MGM stock at a minimum total cost of $1,030,000, the 3 directors resigned, and the petitioner was elected as 1 of the 15 MGM directors. His purpose in becoming an MGM director was to make a profit by improving MGM's performance. As a director, the petitioner participated actively in MGM's corporate affairs by attending board meetings, by giving the benefit of his judgment on corporate affairs, and by inspecting the corporate properties to determine how they might be better managed.

On April 17, 1961, the petitioner sold 3,400 shares of MGM stock for a total of $227,648.28. The gain realized by the petitioner on this sale was reported as a long-term capital gain on his 1961 Federal income tax return, along with the gains from other sales of MGM stock in March 1961. On various dates from September 18 through October 2, 1961, the petitioner purchased a total of 3,000 shares of MGM stock for a total of $146,960.39. The petitioner was an MGM director throughout 1961.

On January 16, 1962, the Division of Corporation Finance of the Securities and Exchange Commission (SEC)

wrote a letter to the secretary of MGM giving its comments on the preliminary material soliciting proxies which MGM had prepared for the annual MGM stockholders meeting to be held on February 23, 1962. It noted that the petitioner had purchased 3,000 shares of MGM stock during September and October of 1961, after having sold a like number within the previous 6 months, and that if he realized:

> any material profits from these transactions which under Section 16(b) of the Securities Exchange Act of 1934 inure to and are recoverable by the issuer, the pertinent facts with respect to these transactions should be disclosed in the proxy statement * * *

Section 16(b) of the Securities Exchange Act of 1934 prohibits an "insider," such as a corporate director, from buying and selling or selling and buying, within a 6-month period, the stock of a corporation in which he is an insider. If such a transaction occurs and results in a profit, the corporation should either be paid the profit (commonly known as the "insider's profit") or it should show the profit on its annual report as a debt owed to the corporation. 15 U.S.C. sec. 78p(b) (1971). The difference between the selling and buying price in this case was $53,870.81.

Upon receipt of the SEC letter, the secretary of MGM immediately informed the petitioner of its contents. The petitioner believed that if any section 16(b) violation

had occurred, it had been solely the result of inadvertence. However, so as not to delay the issuance of MGM's proxy statement and so as to avoid the impact which disclosure of his potential section 16(b) liability might have on his business reputation, the petitioner immediately decided to pay MGM $53,870.81. The payment was made on the following day, and as a result, MGM was able to print its proxy statement, which was dated January 18, 1962, without any reference to the insider's profit problem.

On February 1, 1962, the petitioner received from his personal financial assistant a memorandum calling his attention to a situation in which a corporation did not require the insider to make a payment of his section 16(b) profit to the corporation because the violation was inadvertent. On the basis of such memorandum, the petitioner wrote to the secretary of MGM on February 6, 1962, to request a refund of the $53,870.81 payment which he had made. The matter was referred by MGM to independent counsel for an opinion, and such counsel recommended that MGM not make the refund. No refund was ever made.

In 1962, the petitioner received $100,000.16 as his salary from CFC, $89,512.00 in dividend income from his MGM stock, and $5,000.00 in director's fees from MGM. He received no other director's fees during 1962.

On their 1962 joint Federal income tax return, the petitioners deducted the $53,870.81 payment to MGM as an ordinary loss, and the respondent determined that such loss was a long-term capital loss.

OPINION

The only issue for decision is whether the petitioner is entitled to deduct the payment which he made to MGM as a business expense under section 162(a) or as a business loss under section 165(a).

This issue first came before this Court in William L. Mitchell, 52 T.C. 170 (1969). In that case, the taxpayer was a corporate vice president who had allegedly violated section 16(b), and we found that he was in the trade or business of being a corporate executive and that he made a payment of his alleged insider's profit to the corporation so as to avoid injury to his business reputation, embarrassment to his employer and himself, and the expense of future litigation. We, therefore, held that the payment constituted an ordinary and necessary expense of the taxpayer's trade or business. Our decision in Mitchell was reversed by the Court of Appeals for the Sixth Circuit. 428 F. 2d 259 (C.A. 6, 1970), cert. denied 401 U.S. 909 (1971).

The issue arose again in James E. Anderson, 56 T.C. 1370 (1971), on appeal (C.A. 7, Dec. 23, 1971), in which we thoroughly reconsidered the bases for our holding in Mitchell in the light of the reversal of that decision by the Sixth Circuit. With due respect to the views of that circuit court, we again held that a payment made by the taxpayer on account of his apparent violation of section 16(b) was an ordinary and necessary business expense. The taxpayer was a vice president of the Zenith Radio Corporation, and we found that he was in the trade or business of being a corporate executive, that the obligation to make the section 16(b) payment arose out of his status as a Zenith employee, and that the payment was made to preserve his employment with Zenith and avoid injury to his business reputation.

In urging us to hold that the payment made to MGM constituted an ordinary and necessary business expense, the petitioner contends that he was in a trade or business which included being a director of MGM, that his obligation to make the section 16(b) payment arose out of his status as an MGM director, and that the payment was made to avoid injury to his business reputation and to avoid delay in the issuance of the MGM proxy statement. The respondent concedes that the petitioner's activities,

separate from his position with CFC, constituted a trade or business. However, he argues that we should overrule our two prior decisions and apply the doctrine of Arrowsmith v. Commissioner, 344 U.S. 6 (1952), and conclude as a matter of law that the loss was a capital loss. Alternatively, he contends that the present case is distinguishable from Anderson and Mitchell because it is unreasonable to conclude as a fact that the petitioner had a business purpose in making the section 16(b) payment.

We decline to overrule our prior decisions. This Court thoroughly considered the applicability of the Arrowsmith doctrine in Anderson and Mitchell, and concluded that the doctrine was not applicable because the section 16(b) payment was not directly and integrally related to the earlier sales transaction which gave rise to the capital gain. In Mitchell, we noted the lack of any relationship between the amount of the taxable gain or loss recognized on the sale transaction and the amount of section 16(b) profit which inures to the corporation, and in Anderson, we noted that the sale which gave rise to the capital gain was made in the taxpayer's status as a shareholder, while his obligation to make the payment arose out of his status as an employee. Similarly, in the present case, there is a lack of correlation between

the amount of capital gain recognized on the sale and the amount of the section 16(b) payment, and the obligation to make the payment arose out of the petitioner's status as a director and not out of his status as a shareholder. It is true that the petitioner became a director of MGM to enhance the value of his stock in the corporation, but nevertheless, any obligation to pay MGM the insider's profit arose out of his role as a director.

We also reject the contention that there was no overriding business purpose for making the payment to MGM. In Anderson, this Court treated the taxpayer as being in the trade or business of being a corporate executive and found that the obligation to make the payment arose out of such trade or business and that the payment was made to protect his business reputation. In this case, it is conceded by the respondent that the petitioner was in a trade or business separate from his activities with CFC, and his activities as a director of MGM were clearly a part of that trade or business so that the obligation to make the payment arose out of a trade or business. Thus, in this case, we are not presented with a situation in which being a director was not part of a trade or business of the taxpayer. See R. Walter Graham, Jr., 40 T.C. 14 (1963), revd. on another point 326 F. 2d 878 (C.A. 4,

1964); cf. Carl F. Fayen, 34 T.C. 630 (1960); Stephen H. Tallman, 37 B.T.A. 1060 (1938).

Furthermore, we find that the payment was made to protect the business reputation of the petitioner and to avoid delay in the issuance of the MGM proxy statement. The respondent suggests that the petitioner made the payment merely because he was required to do so as a matter of law and contends that the disclosure of an apparently innocent violation of section 16 (b) would not have blemished the petitioner's business reputation. Yet, the petitioner could not control the reporting of the circumstances to the business community; and it was not unreasonable for the petitioner to believe that his business reputation, which he considered to be his most important asset, might be damaged by incomplete reporting, by people not completely understanding the circumstances, or by mere association with an alleged securities violation. In addition, the timing of the events supports the petitioner's statement as to his reasons. Immediately after learning about the problem, he agreed to make the payment to MGM, and clearly there was insufficient time for him to have secured considered legal advice as to his liability to MGM. If he had made the payment because of a belief that he was required to do so, he surely

would have sought such legal advice, and more time would have been required to secure such advice and to make a decision based upon it.

Both payments made to protect a taxpayer's business reputation (James E. Anderson, supra; William L. Mitchell, supra; Laurence M. Marks, 27 T.C. 464 (1956); Paul Draper, 26 T.C. 201 (1956)), and payments made in settlement of mismanagement claims arising out of the taxpayer's trade or business (William L. Butler, 17 T.C. 675 (1951); Great Island Holding Corporation, 5 T.C. 150 (1945); John Abbott, 38 B.T.A. 1290 (1938)), have been held to be ordinary and necessary business expenses. Furthermore, in William L. Mitchell, we allowed a deduction where the payment was made to avoid injury to the taxpayer's business reputation and embarrassment to the involved corporation. For similar reasons, we hold that the payment made in this case is deductible as an ordinary and necessary business expense.

Decision will be entered for the petitioners.

UNITED STATES TAX COURT

NATHAN CUMMINGS and JOANNE T. CUMMINGS,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 2653-71

MOTION FOR RECONSIDERATION AND REVISION OF OPINION

THE RESPONDENT MOVES that the Court reconsider its findings of fact and opinion, filed April 23, 1973, in the above-entitled case; and

THE RESPONDENT FURTHER MOVES that the Court modify said Opinion by deciding the sole issue involved in the instant case in accord with the contentions of the respondent.

IN SUPPORT THEREOF, the respondent respectfully shows unto the Court:

1. The issue involved in the instant case was whether a payment by Nathan Cummings, the petitioner herein, to MGM, a corporation of which he was a director, as required by the Securities Exchange Act of 1934 § 16(b), for an "insider's profit" having its genesis in a stock transaction from which the petitioner realized a long-term capital gain, should be treated as a long-term

capital loss or as an ordinary and necessary business expense.

2. The respondent contended that the payment must be treated as long-term capital loss, relying on Arrowsmith v. Commissioner, 344 U.S. 6 (1952).

3. The petitioner contended that the payment was made to protect his business reputation and, therefore, it should be treated as a business expense under Int. Rev. Code of 1954 § 162(a) [hereinafter referred to as Code].

4. The Court held that the payment was an ordinary and necessary business expense of the petitioner and was thereby entitled to Code § 162(a) treatment.

5. The Court reached this determination by finding that the rule of Arrowsmith v. Commissioner, supra was not applicable because the section 16(b) payment was not directly and integrally related to the earlier sales transaction which gave rise to the capital gain. The Court stated that:

> . . . The obligation to make the payment arose out of the petitioner's status as a director and not out of his status as a shareholder. It is true that the petitioner became a director of MGM to enhance the value of his stock in the corporation, but nevertheless, any obligation to pay MGM the insider's profit arose out of his role as director.

6. The Court relied on its holdings in William L. Mitchell, 52 T.C. 170 (1969), rev'd 428 F.2d. 259 (6th

Cir. 1970), cert. denied 401 U.S. 909 (1971) and James E. Anderson, 56 T.C. 1370 (1971) appeal then pending (7th Cir., Dec. 23, 1971) in finding Arrowsmith v. Commissioner, supra inapplicable herein. In both of these cases, the Court determined that the fact that the taxpayers therein acted in different capacities when selling the stocks and when repaying the section 16(b) liability distinguished and rendered inapplicable the Rule in Arrowsmith v. Commissioner, supra.

7. At the time of the Court's decision in the instant case, said decision was in conflict only with the Sixth Circuit's holding in Mitchell v. Commissioner, supra.

8. On June 14, 1973, some 52 days after the Court had entered their decision in the instant case, the United States Court of Appeals for the Seventh Circuit filed its opinion in the case of Anderson v. Commissioner, supra. Specifically, that Court held that Arrowsmith v. Commissioner, supra was applicable in Anderson v. Commissioner, supra and that the Tax Court's distinction, based on assertedly different capacities of the taxpayer when selling his stock and when disgorging his short-swing profits, was unpersuasive.

9. In light of this recent conflicting holding on the instant issue by the Seventh Circuit and in light of

the Court's heavy reliance on their now reversed decision in James E. Anderson, supra, the respondent now moves that the Court reconsider and revise the opinion in the instant case consistent with the principles laid down by the Sixth and Seventh Circuits in Mitchell v. Commissioner, supra and Anderson v. Commissioner, supra.

10. The respondent contends that Arrowsmith v. Commissioner, supra is applicable in the instant case irrespective of the capacities in which the petitioner herein acted in the sale of his stock and the subsequent section 16(b) repayment. The respondent further contends that if Arrowsmith v. Commissioner, supra is found to be applicable in the instant case, the result which is dictated thereby, long-term capital loss, must take precedent over any result dictated by Code § 162(a). The respondent does not now argue that Code § 162(a) is not applicable in the instant case, but only that the Arrowsmith v. Commissioner, supra rule is controlling and that the result dictated by Code § 162(a) cannot be given effect.

WHEREFORE, it is prayed that this motion be granted.

LAWRENCE B. GIBBS,
Acting Chief Counsel,
Internal Revenue Service

OF COUNSEL:

ROBERT A. BRIDGES,
Director, Tax Court
Litigation Division
GARY R. STROHAUER,
Attorney,
Internal Revenue Service

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UNITED STATES TAX COURT

JUL 5 - 1973

NATHAN CUMMINGS and JOANNE T. CUMMINGS, Petitioners,	)	
v.	)	Docket No. 2653-71
COMMISSIONER OF INTERNAL REVENUE, Respondent.	)	

MOTION TO VACATE DECISION

THE RESPONDENT MOVES that the Court vacate the decision entered in the above-entitled case on April 23, 1973.

IN SUPPORT THEREOF, the respondent respectfully shows unto the Court:

1. The Court entered its decision in the above-entitled case on April 23, 1973, pursuant to its findings of fact and opinion, 60 T. C. No. 11.

2. On June 14, 1973 the United States Court of Appeals for the Seventh Circuit filed its opinion in the case of Anderson v. Commissioner, __F.2d__, 32 AFTR2d 73-5167 (7th Cir. 1973), rev'g 56 T.C. 1370 (1971). This case involved an issue virtually identical to the issue in the above-entitled case; whether the rule of Arrowsmith v. Commissioner, 344 U.S. 6 (1952) applies to require that payments in satisfaction

of Securities Exchange Act of 1934, §16(b) liability be characterized in the same terms as the profit realized on the sale of stock by the taxpayer, namely as a long-term capital transaction. The Court, in making their decision, in the above-entitled case, relied on their decision in Anderson (56 T. C. 1379 (1971)) which has now been reversed by the Seventh Circuit. The respondent's contentions in this regard are more fully set forth in a Motion for Reconsideration and Revision of Opinion in the instant case, which motion is concurrently being lodged with the Court.

3. The decision in the instant case will not become final until July 22, 1973. Neither party has as of the date of the filing of this motion filed a petition for review of the Court's decision in the instant case.

WHEREFORE, it is prayed that this motion be granted.

LAWRENCE B. GIBBS,
Acting Chief Counsel,
Internal Revenue Service.

OF COUNSEL:

ROBERT A. BRIDGES,
Director, Tax Court
Litigation Division
GARY N. STROHAUER,
Attorney,
Internal Revenue Service.

7/5/73
RPM 7/5/73

UNITED STATES TAX COURT
WASHINGTON

1973 JUL 9 PM 4 23

[illegible] COLLINS and [illegible] COLLINS,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Docket No. 2653-71

O R D E R

The respondent has moved to vacate the Court's decision in this case, entered on April 23, 1973, and the Court has granted leave to file such motion out of time. At the same time, the respondent has moved to reconsider the Court's opinion in this case. In order to stop the running of the period for appeal of the Court's decision, to give the parties an opportunity to present their views with respect to the motion for reconsideration, and to enable the Court to consider such views, it is

ORDERED: That the respondent's motion to vacate the decision in this case is hereby granted, and that such decision is hereby vacated and set aside.

/s/ Charles R. Simpson
Judge

Dated: Washington, D. C.
July 9, 1973

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61 T. C. No. 1

UNITED STATES TAX COURT

NATHAN CUMMINGS and JOANNE T. CUMMINGS, Petitioners v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 2653-71. Filed October 2, 1973.

P was a director and shareholder of MGM, and in 1962, he made a payment to MGM of $53,870.81 when the SEC indicated that P might be liable to MGM for such amount as an insider's profit within the meaning of sec. 16(b) of the Securities Exchange Act of 1934. Held, under the particular circumstances of this case, the payment is an ordinary and necessary business expense of P; Nathan Cummings, 60 T.C. 91 (1973), reaffirmed.

Anderson A. Owen, Edward W. Rothe, and Glen H. Kanwit, for the petitioners.

Nelson E. Shafer, for the respondent.

OPINION

SIMPSON, Judge: An opinion was filed in this case on April 23, 1973, 60 T.C. 91. In such opinion, we held that in the circumstances of the case, the petitioner was entitled, by virtue of section 162 of the Internal Revenue Code of 1954,[1] to deduct as an ordinary and necessary business expense a payment made to MGM. Such payment was made after an indication that the petitioner might be liable for an insider's profit in violation of section 16(b) of the Securities Exchange Act of 1934, but the Court found that the payment was made to protect the business reputation of the petitioner and to avoid delay in the issuance of the proxy statement. In so holding, we relied on William L. Mitchell, 52 T.C. 170 (1969), revd. 428 F. 2d 259 (C.A. 6, 1970), cert. denied 401 U.S. 909 (1971), and James E. Anderson, 56 T.C. 1370 (1971), then on appeal to the Seventh Circuit.

Subsequently, our holding in Anderson was reversed. Anderson v. Commissioner, ___ F. 2d ___ (C.A. 7, June 14, 1973). Based on such reversal, the respondent moved for

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[1] All statutory references are to the Internal Revenue Code of 1954, except that any reference to section 16(b) is to such section of the Securities Exchange Act of 1934.

reconsideration of the opinion and to vacate the decision in the case. On July 9, 1973, the respondent's motion to vacate decision was granted in order to stop the running of the period for appeal, and the parties were directed to submit legal memorandums in support of their positions with respect to reconsideration and revision of our opinion. Such memorandums have been filed.

In James E. Anderson, supra, we found that there was no connection between the two events--the taxpayer recognized capital gains in his capacity as a shareholder but paid the alleged insider's profit in his capacity as an officer. The Seventh Circuit found that reasoning unpersuasive. It concluded that at all times relevant, the taxpayer acted in one capacity--that of an insider. The court found that the sale and the subsequent payment were inextricably intertwined. Accordingly, under the doctrine of Arrowsmith v. Commissioner, 344 U.S. 6 (1952), the taxpayer was entitled only to a capital loss. Moreover, the court thought that to allow an ordinary deduction for the payment would frustrate the purpose of section 16(b), and in reliance upon Tank Truck Rentals v. Commissioner, 356 U.S. 30 (1958), it believed that the deduction should also be denied for that reason.

We have carefully re-examined our position in the light of the views expressed by the Seventh Circuit, but

with due respect to that court, we are not convinced that our position should be changed. Since venue for appeal of this case is in the Second Circuit,[2] we are not required to follow the decisions of the Circuit Courts in Anderson v. Commissioner, supra, and Mitchell v. Commissioner, 428 F. 2d 259 (C.A. 6, 1970). Jack E. Golsen, 54 T.C. 742 (1970), affd. 445 F. 2d 985 (C.A. 10, 1971), cert. denied 404 U.S. 940 (1971).

Simply stated, the doctrine set forth in Arrowsmith is that, without breaching the principle of the annual accounting period, the tax treatment of a transaction occurring in one year may control the tax treatment afforded a second transaction in a subsequent year where both transactions are integrally related. However, for Arrowsmith to apply, there must be a relationship between two transactions which is sufficient to require the conclusion that both transactions are parts of a unified whole. James E. Anderson, 56 T.C. at 1376. In Arrowsmith, the Court found such relationship in part because the payment there at issue would have been offset against the capital gain, had both transactions occurred in the same

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2 The petitioners maintained their residence in New York, New York, at the time of the filing of their petition in this case.

year. In United States v. Skelly Oil Co., 394 U.S. 678 (1969), a sufficient relationship was found because the percentage depletion allowance would have been reduced, had the payment at issue been made in the year income was initially recognized under the claim of right.

In the present case, there was no such integral relationship between the sale of stock and the payment to MGM. Had Mr. Cummings made the payment to MGM in the same year as the sale and purchase, there would have been no reason to require that the payment be offset against the gain realized on the sale. When he sold his MGM stock, he sold a capital asset and realized a capital gain. The subsequent purchase of other MGM stock for a lower price does not, as a matter of tax law, provide a basis for reducing or offsetting the capital gain already realized. William L. Mitchell, 52 T.C. at 174.

Nor is the capital gain reduced by the payment to MGM. The Seventh Circuit in Anderson appears to have assumed that there was a violation of section 16(b) and that the payment was made in satisfaction of a liability resulting from such violation. However, in Anderson, and also in the case before us today, there has been no determination that the taxpayer violated section 16(b) or that he was liable under that section to make any payment. As we pointed out before, Mr. Cummings made the payment

promptly after learning of the position taken by the Securities Exchange Commission (SEC); he acted without legal advice; and these circumstances indicate clearly that the payment was not made because of a recognition of a legal duty to do so. On the contrary, it is clear that the payment was made for business reasons and for reasons growing out of his responsibility as a director of MGM. He made the payment to protect his business reputation and to avoid a delay in the issuance of the MGM proxy statement. In United States v. Generes, 405 U.S. 93 (1972), the Supreme Court pointed out that when an individual, who is both a shareholder and an employee of a corporation, makes or guarantees a loan of the corporation, it is necessary to decide in which capacity he acted. In like manner, it is also necessary to decide whether, when Mr. Cummings made the payment to MGM, he was acting as a shareholder or as a director, and we remain convinced that it was as a director that he decided to make the payment to MGM.

In our opinion, Tank Truck Rentals v. Commissioner, supra, is not applicable in this case. In that case, the Court denied a deduction for fines paid as a result of the admitted violation of a State law, because allowance of the claimed deduction would have resulted in an immediate and severe frustration of public policy. Each

case was to be decided on the basis of its own facts and circumstances (Tank Truck Rentals v. Commissioner, 356 U.S. at 35; see also Laurence M. Marks, 27 T.C. 464, 469 (1956)), and the circumstances here are significantly different from those in Tank Truck Rentals. There has been no finding that Mr. Cummings violated the law by his sale and purchase of MGM stock; there was merely the indication by the SEC that he may have done so. This situation is similar to that in Joseph P. Pike, 44 T.C. 787, 798-799 (1965), in which we stated that Tank Truck Rentals is inapplicable when the payment at issue is not attributable to the violation of the State law but only to the allegation of a violation--in such circumstance, the payment cannot be considered a penalty.

Accordingly, in the circumstances of this case, we believe that the petitioner recognized capital gains as a shareholder, but made the payment to MGM in his capacity as a director. Had the payment been made in the same year as the gain was recognized, it would not have reduced the amount of such capital gain. Thus, Arrowsmith v. Commissioner, supra, has no applicability in this case.

The respondent's motion for reconsideration and revision of the opinion is hereby denied.

Reviewed by the Court.

Decision will be entered for the petitioners.

TANNENWALD, J., did not participate in the consideration and disposition of this case.

DAWSON, J., dissenting: I respectfully dissent for the reasons stated in my dissenting opinion in James E. Anderson, 56 T.C. at 1377-1379. I would follow the reversal of the Anderson case by the Court of Appeals for the Seventh Circuit (73-2 U.S.T.C. Par. 9501). See also Mitchell v. Commissioner, 428 F. 2d 259 (C.A. 6, 1970), reversing 52 T.C. 170 (1969).

FEATHERSTON, QUEALY, GOFFE, and HALL, JJ., agree with this dissent.

DRENNEN, J., dissenting: I did not participate in this Court's consideration of, and decision in, James E. Anderson, 56 T.C. 1370, and hence feel less compunction about taking a position contrary to the position we took in William L. Mitchell, 52 T.C. 170, than some of my colleagues. I am inclined to agree with Judge Dawson in his dissenting opinion in Anderson that the Supreme Court in United States v. Skelly Oil Co., 394 U.S. 678, meant that the Code should not be interpreted to permit the equivalent of a double deduction absent a clear declaration by Congress of such intent. I recognize that artful, technical arguments can be made that the Court had different circumstances and different deductions before it in Skelly Oil than we have here and, therefore, that case is not controlling here. But I believe that is more wishful thinking than practical analysis of the Court's opinion and that Skelly Oil should be considered controlling here. Such is the view taken by two Courts of Appeals in reversing this Court in Mitchell v. Commissioner, 428 F. 2d 256 (C.A. 6, 1970), and Anderson v. Commissioner, ____ F. 2d ____ (C.A. 7, June 14, 1973).

While I realize that the proposal I am making is not before the Court in this case, and may never be urged by either a taxpayer or the Commissioner, because a tax benefit in the hand is worth two possible ones in the future, I am

still of the view, suggested in my concurring opinion in Mitchell, that perhaps the best way to resolve the conflicting legal arguments and equities under circumstances such as here present would be to add the amount repaid because of the threat of section 16(b) of the Securities Exchange Act of 1934 to the basis of the stock purchased and presently held by the taxpayer. Surely the purchase in both the purchase-sale and the sale-purchase transactions is basically responsible for triggering the repayment because of the possible violation of section 16(b) and thus the repayment is tantamount to an additional cost of the purchased stock. This would deny the purported "insider" recognition of his repayment loss until he disposes of the stock, the purchase of which triggered the payment, and the gain or loss on such ultimate disposition will be characterized the same for tax purposes as the gain he realized and had recognized on the sale of his previously held stock.

I recognize that this proposal would not be applicable in circumstances such as those in United States v. Skelly Oil Co., supra, and Arrowsmith v. Commissioner, 344 U.S. 6, where no purchase was involved, but that should not prevent it from being applied in circumstances in which it might provide the better solution.

UNITED STATES TAX COURT
WASHINGTON

NATHAN CUMMINGS and JOANNE T. CUMMINGS, Petitioners v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 2653-71

DECISION

Pursuant to the determination of this Court as set forth in its Findings of Fact and Opinion filed April 23, 1973, and its Opinion filed October 2, 1973, it is

ORDERED and DECIDED: That there is no deficiency in income tax due from the petitioners for the year 1962.

Charles Clemson

Judge

Entered: OCT 2 1973

ENTERED OCT 2 1973

U.S. GOVERNMENT PRINTING OFFICE

UNITED STATES TAX COURT

NATHAN CUMMINGS AND JOANNE T. CUMMINGS,	)	UNITED STATES TAX COURT FILED
Petitioners-Appellees,	)	1973 DEC 28 AM 11 19
v.	)	Docket No. 2653-71
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent-Appellant.	)	

NOTICE OF APPEAL

Notice is hereby given that the Commissioner of Internal Revenue hereby appeals to the United States Court of Appeals for the Second Circuit from the decision of this Court entered in the above-captioned proceeding on the second day of October, 1973.

At the time the taxpayers filed their petition with the Tax Court seeking a redetermination of their tax liability, their residence was in New York, New York. Accordingly, proper venue for review of the Tax Court's decision is in the United States Court of Appeals for the Second Circuit.

(Signed) Scott P. Crampton
CJR

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CERTIFICATE OF SERVICE

It is hereby certified that service of this reply brief has been made on opposing counsel by mailing four copies thereof on this 8th day of ~~April~~ MAY, 1974, in an envelope, with postage prepaid, properly addressed to him, respectively as follows:

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